United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1901.

No. 1113. **100**

No. 11, SPECIAL CALENDAR.

JOHN A. HAMILTON, RECEIVER OF JAMES L. BARBOUR & SON, AND HENRY O. TOWLES, APPELLANTS,

vs.

JOSEPH SHILLINGTON AND EDWIN FORREST, ADMINISTRATORS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A SPECIAL TERM FOR ORPHANS' COURT BUSINESS.

FILED JULY 13, 1901.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 19, 1901.

In the Court of Appeals of the District of Columbia.

JOHN A. HAMILTON, Receiver, *et al.*, Appellants,
vs.
JOSEPH SHILLINGTON and EDWIN FORREST, Adm'rs. } No. 1113.

1–3 Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of ANNIE E. NORTHCUTT, Deceased. No. 5451, Administration.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

4 In the name of God amen,

I Annie E, Northcutt, of the city of Washington, and District of Columbia, being of sound and disposing mind and memory, and capable of executing a valid deed or contract, hereby revoking any and all former wills or testaments by me at any time made, do make publish and declare this as and for my last will and testament, that is to say, subject to the payment of all my just debts and funeral expenses, which I direct shall be paid as soon after my death as may be convenient, I give, devise and bequeath all my estate, real, personal and mixed, and wheresoever the same may be situate, as follows:

Item 1. I give and bequeath to my beloved sister Mira Dugan, of the city of Brooklyn, in the State of New York, her executors, administrators and assigns, all money deposited in my name at the time of my death, in the Central national bank of the said city of Washington, and in the National savings bank, of the same place. And I also give and bequeath to my said sister, Mira Dugan, her executors, administrators and assigns, all the furniture, beds and bedding, silver and glassware, and all other household goods and effects, including paintings, pictures, furnishings, and articles of vertu, in houses numbered 401 13th street northwest and 1229 D street northwest, in said city of Washington, and all my clothing and wearing apparel, horses, carriages, harness, carriage robes and other belongings thereto.

Item 2. I give and bequeath to my niece, Irene Dugan, daughter

of my said sister Mira Dugan, her executors, administrators and assigns, the following articles of jewelry now owned by me, to wit:
5 one large three-stone diamond bracelet, the diamonds in said bracelet aggregating about twenty-nine carats in weight: one diamond and sapphire bracelet: one pair of diamond hoop ear-rings: one solitaire diamond ring, the diamond in said ring weighing about three carats: one solitaire diamond lace-pin, the diamond in said pin weighing about six carats; and in addition the sum of five thousand ($5,000.00) dollars in cash.

Item 3. I give and bequeath to my niece Burnadetta—commonly called Detta or Detty—Dugan, daughter of my said sister Mira Dugan, her executors, administrators and assigns, the following articles of jewelry now owned by me, to wit; One cluster diamond bracelet: one solitaire diamond bracelet: one pair of diamond screw ear-rings, the diamonds in said ear-rings aggregating about three and one-half carats in weight: one three-stone diamond lace-pin.

Item 4. I give and bequeath to my two nephews, Philip Dugan and Frank Dugan, sons of my said sister Mira Dugan, their several executors, administrators and assigns, the sum of one thousand ($1,000.00) dollars each.

Item 5. I give, devise and bequeath to Joseph H. McCann, of the said city of Washington, his heirs and assigns forever, the following real estate located in the said city of Washington and described as follows: Part of original lot numbered four (4), in square numbered two hundred and ninety-two (292), beginning on Pennsylvania avenue at the division line between lots three (3) and four (4), and running thence westerly on said avenue twenty-three (23) feet seven (7) inches: thence southerly at right angles to said avenue fifty-six (56) feet and three (3) inches; thence due south seventy (70) feet eight (8) inches to "D" street: thence east twenty feet; thence north
6 fifty-six (56) feet four (4) inches, and thence at right angles to Pennsylvania avenue sixty-two (62) feet eleven (11) inches to the beginning, together with the improvements thereon consisting of house numbered 1233 on Pennsylvania avenue northwest, and house numbered 1229 on D street northwest, subject however to any and all encumbrance which now is or may be at the time of my death, on said described land and premises, which said encumbrance the said Joseph H. McCann shall assume.

All the rest, residue and remainder of the estate, real, personal and mixed of which I may die seized or possessed, I give, devise and bequeath to the said children of my said sister, Mira Dugan, to wit Irene, Burnadetta, Philip and Frank or those of them who shall be living at the time of my death, their several heirs, executors, administrators and assigns—to be equally divided amongst them, share and share alike,

In case any person, including my said sister Mira, to whom a legacy or bequest is given or made by this will, shall die before I do, leaving a child or children; him or her surviving, my will and desire is, and I do so direct, that such child or children shall have and take the legacy or bequest, given to its or their parent, and which such parent would have taken if alive.

And I do hereby nominate, constitute and appoint my sister Mira Dugan, of the city of Brooklyn in the State of New York, and Joseph H. McCann, of the city of Washington, in the District of Columbia, executors of this my last will and testament, without being required to furnish bond or other security for the faithful performance of their duties as such.

In testimony whereof I have hereunto set my hand and
7 affixed my seal on the twenty-sixth day of February in the year of our Lord one thousand eight hundred and ninety-two (A. D. 1892)

ANNIE. E. NORTHCUTT [SEAL.]

Signed, sealed, published, and declared by Annie E. Northcutt, the above-named testatrix, as and for her last will and testament, in the presence of us, who, at her request, in her presence, and in the presence of each other, have subscribed our names as witnesses thereto on this twenty-sixth day of February, in the year of our Lord one thousand eight hundred and ninety-two.

THOS. H. CALLAN,
472 *Louisiana Ave.*
R. FORD COMBS,
468 *La. Ave., Washington, D. C.*
ALBERT H. SHILLINGTON,
468 *La. Ave., Washington, D. C.*
JOSEPH SHILLINGTON,
468 *La. Ave., Wash'n, D. C.*

8 Form No. 2.

The Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DECEMBER 10TH, 1896.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared Thomas H. Callan, one of the subscribing witnesses to the foregoing last will and testament of Annie E. Northcutt, deceased, late of the District of Columbia, and solemnly made oath on the Holy Evangels of Almighty God that he did see the testatrix therein named sign this will; that she published, pronounced, and declared the same to be her last will and testament; that at the time of so doing she was, to the best of his apprehension, of sound and disposing mind and capable of executing a valid deed or contract, and that his name as witness to the aforesaid will was signed in the presence and at the request of testatrix and in the presence of the other subscribing witnesses thereto.

Test:

J. NOTA McGILL,
Register of Wills.

9 Form No. 2.

The Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DECEMBER 11TH, 1896.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared Albert H. Shillington and Joseph Shillington, two of the subscribing witnesses to the foregoing last will and testament of Annie E. Northcutt, deceased, late of the District of Columbia, and severally made oath on the Holy Evangels of Almighty God that they did see the testatrix therein named sign this will; that she published, pronounced, and declared the same to be her last will and testament; that at the time of so doing she was, to the best of their apprehension, of sound and disposing mind and capable of executing a valid deed or contract. and that their names as witnesses to the aforesaid will were signed in the presence and at the request of testatrix and in the presence of each other and of the other subscribing witnesses thereto.

Test: J. NOTA McGILL,
Register of Wills.

Endorsement: Will of Annie E. Northcutt. Filed March 8, 1893. L. P. Wright, register of wills.

10 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT.

The petition of Mira Dugan respectfully represents:

That she is a resident of Brooklyn, State of New York, and a citizen of the United States; that on the evening of March 7th, 1893, Annie E. Northcutt, a half-sister of your petitioner, departed this life in the city of Washington, District of Columbia, the last place of her domicil; that the estimated value of the personal property left by the said Annie E. Northcutt is twenty-seven thousand seven hundred and fifty dollars ($27,750), and it consists of jewelry, household furniture, building association stock, horse and carriage, and money in bank, and the same is all situated in the District of Columbia; that the said decedent died testate, leaving a last will and testament, bearing date February 26th, 1892, and here produced and filed in court; that the sole next of kin of the said decedent are the following:

John McGrane, a brother, now residing in Providence, Rhode Island; Lawrence McGrane, a brother, now residing in Brooklyn, New York; Margaret Kelly, a half-sister, nowr esiding in Longford, Ireland, and your petitioner, all of whom are adults.

Your petitioner further represents that the said decedent departed this life owing an indebtedness of about twelve thousand dollars ($12,000).

That one of said next of kin resides in Longford, Ireland, and as due publication has to be made of the application for probate
11 of this said last will and testament and some delay will be occasioned thereby, and in the meantime some proper person should be placed in possession of said property for the preservation of the same and a true inventory make, and perform such other duties as the court in its discretion may authorize, your petitioner therefor- prays that a collector may be appointed for the purposes herein indicated.

As the said last will and testament leaves all of the personal property of the decedent to the petitioner and her daughters, the petitioner prays that a mere nominal bond may be required of the collectors or collector appointed in pursuance of the request herein made.

Your petitioner respectfully requests the court to appoint as such collectors Joseph Shillington and Edwin Forrest, of the District of Columbia.

MIRA DUGAN.

I, Mira Dugan, being first duly sworn, depose and say that I have heard read the petition above appearing by me subscribed and know the contents thereof; that the facts therein stated of my own knowledge are true and those stated on information and believe I believe to be true.

MIRA DUGAN.

Sworn to and subscribed before me this 8th day of March, A. D. 1893.

[SEAL.] ALBERT H. SHILLINGTON,
Notary Public.

Endorsement: Petition of Mira Dugan praying the court to appoint Joseph Shillington and Edwin Forrest collectors. Filed March 8, 1893. L. P. Wright, register of wills.

12 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of ANNIE E. NORTHCUTT, Deceased.

The petition of Mira Dugan respectfully represents—

That she is a resident of Brooklyn, State of New York, and a citizen of the United States; that heretofore, to wit, on the seventh day of March, 1893, Annie E. Northcutt, a half-sister of the petitioner, departed this life in the city of Washington, District of Columbia, her last place of domicil; that the estimated value of her personal property is twenty-seven thousand seven hundred and fifty dollars ($27,750), and it consists of household furniture, jewelry, horses and carriage, and money in bank, as well as certain promissory notes; that said personal property is all located in the District of Columbia; that said decedent died testate, leaving a last will

and testament dated the 26th day of February, 1892, wherein and whereby the said Annie E. Northcutt, deceased, nominated and appointed your petitioner and Joseph H. McCann her executors; that the sole next of kin of the said decedent are the following: John McGrane, her brother, now residing in Providence, Rhode Island; Lawrence McGrane, a brother, now residing in Brooklyn, New York; Margaret Kelly, a half-sister, now residing in county Longford, Ireland, and the petitioner; all of whom are adults.

Your petitioner files herewith a renunciation of executorship and respectfully requests the court to select and appoint Joseph
13 Shillington and Edwin Forrest, as administrators of said estate, with |the will annexed, and that said will may be duly admitted to probate.

MIRA DUGAN.

JOSEPH SHILLINGTON,
EDWIN FORREST, *Proctors.*

I, Mira Dugan, being first duly sworn according to law, depose and say that I have read over the above petition by me subscribed and know the contents thereof; that the facts therein recited of my own knowledge are true and those recited on information and belie*ve* I believe to be true.

MIRA DUGAN.

Subscribed and sworn to before me this the 15 day of March, 1893.

JAMES P. CAMPBELL,
[SEAL.] *Notary Public, New York County.*

Endorsement: Petition of Mira Dugan for probate of will. Filed March 20, 1893. L. P. Wright, register of wills.

14 In the Matter of the Estate of ANNIE E. NORTHCUTT.

Whereas I, the undersigned, Mira Dugan, am nominated and appointed in and by the last will and testament of Annie E. Northcutt, late of the city of Washington, District of Columbia, deceased, one of the executors thereof, and am unwilling to assume said trust for reasons to me appearing sufficient, but, on the contrary, desire to be relieved therefrom, now, therefore, I, the said Mira Dugan, do hereby renounce and decline the trust and appointment above referred to, and all my right, title, and claim to administer the personal estate of said Annie E. Northcutt, deceased, thereunder, and ask the court to proceed as if I was not named as an execut*or* in said will.

MIRA DUGAN. [SEAL.]

Witness:
EDWIN FORREST.

Endorsement: Renunciation of Mira Dugan as execut*or*. Filed Mar. 20, 1893. L. P. Wright, register of wills.

15 In the Supreme Court of the District of Columbia, Holding a Session for Probate Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT.

Whereas I, the undersigned, Joseph H. McCann, am nominated and appointed in and by the last will and testament of Annie E. Northcutt, late of the District of Columbia, deceased, one of the executors thereof, and am unwilling to assume said trust for reasons to myself good and sufficient, but, on the contrary, desire to be relieved therefrom, now, therefore, I, the said Joseph H. McCann, do hereby renounce and decline the trust and appointment above referred to and all my right, title, and claim to administer the personal estate of said Annie E. Northcutt, deceased, thereunder, and ask the court to proceed as if I were not named as executor in said will, and request the court to appoint Joseph Shillington and Edwin Forrest administrators.

JOSEPH H. McCANN.

In the presence of—
CHARLES McGLADE.

Endorsement: Renunciation of Joseph H. McCann as executor. Filed Mar. 20, 1893. L. P. Wright, register of wills.

16 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of ANNIE E. NORTHCUTT, Deceased. No. 5451.

The Answer of Mira Dugan, the Propounder of the said Last Will and Testament of the said Decedent, to the Caveat Filed by John McGrane.

This propounder, answering, says that said paper-writing dated February 26th, 1892, and heretofore propounded by her as the last will and testament of the said Annie E. Northcutt—that the said paper-writing is the true and valid last will and testament of the said decedent, and that when she executed the same she was of sound and disposing mind, memory, and understanding, and capable of executing any deed or contract; that the same was not procured by undue influence or threats upon said decedent by this respondent or by any other person or persons whatsoever, to her knowledge, but that it was the free and voluntary act of said decedent, and that no fraud was ever exercised or practiced upon said decedent by this respondent or any other person, to her knowledge, and said paper-writing was not procured by fraud, and all allegations to that effect in the said caveat contained are untrue and without foundation in fact.

And now, having fully answered the said caveat and petition, this respondent prays that said will may be admitted to probate and record and letters of administration, with the will annexed, upon

said estate may be issued according to the prayer of her petition heretofore filed herein.

JAMES P. CAMPBELL,
Attorney-in-fact.

The answer under oath of the propounder, Mira Dugan, is hereby waived.

LORENZO A. BAILEY,
Att'y for John McGrane, Caveator.

17 I, James P. Campbell, being first duly sworn according to law, say that I am the attorney of the said Mira Dugan and have read over the above answer by me subscribed for her as attorney-in-fact, and the statements therein made are true to the best of my knowledge, information, and belief.

JAMES P. CAMPBELL.

Subscribed and sworn to before me this 21st day of April, 1893.

M. J. GRIFFITH,
[SEAL.] *Notary Public.*

Endorsement: Answer of proponent, by her att'y, to caveat. Filed Apr. 21, 1893. L. P. Wright, register of wills.

18 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business, April 21, 1893.

In the Matter of the Caveat of JOHN MCGRANE to the Probate of the Paper-writing Propounded as the Last Will and Testament of Annie E. Northcutt, Deceased.

On consideration of the caveat of John McGrane and of the answer, by her attorney, of Mira Dugan, named in the paper-writing propounded as the last will and testament of Annie E. Northcutt, deceased, bearing date February 26, 1892, and of the several proposed issues, it is ordered that the following issues be transmitted for trial by a jury before the circuit court, viz:

1st. Was the paper-writing purporting to be the last will and testament of Annie E. Northcutt, deceased, bearing date February 26, 1892, executed and attested in due form of law? Yes.

2d. Were the contents of said paper-writing purporting to be the last will and testament of said Annie E. Northcutt, deceased, understood by or known to her at or before the alleged execution thereof? Yes.

3rd. Was the said Annie E. Northcutt at the time of executing said paper-writing of sound and disposing mind and capable of executing a valid deed or contract? Yes.

4th. Was the execution of the said paper-writing procured by undue influence exercised and practised upon said Annie E. Northcutt by Mira Dugan or by Joseph H. McCann or by any other person or persons? No.

5th. Was the execution of said paper-writing procured by fraud exercised and practised upon said Annie E. Northcutt by the
19 persons mentioned in the 4th issue or by either of them? No.

6th. Was the execution of said paper-writing the free and voluntary act of said Annie E. Northcutt? Yes.

7th. Was the said paper-writing subsequent to its execution altered or revoked by said Annie E. Northcutt, either in whole or in part, and if in part only what part or parts were so by her altered or revoked? Not revoked in any way or part whatever.

A. B. HAGNER,
Asso. Justice.

Endorsement: Issues and order transmitting the same to circuit court for trial before jury. Filed Apr. 21, 1893. L. P. Wright, register of wills.

20 Supreme Court of the District of Columbia.

SATURDAY, *June* 10, *A. D.* 1893.

Session resumed pursuant to adjournment, Cox, justice, presiding.

In the Matter of the Estate of ANNIE E. NORTHCUTT, Deceased. At Law. No. 34119.

This cause coming on to be heard on application of counsel for the caveatees to have the court name the parties plaintiffs, and defendants, on due consideration thereof it is, this 10th day of June, 1893, by the court ordered that the caveator, John McGrane, be, and he is hereby, made party plaintiff, and Joseph McCann and Myra Dugan, named as executors in the last will and testament of deceased, be, and they are hereby, named as defendants herein.

W. S. COX, *Justice.*

Test: JOHN R. YOUNG, *Clerk.* [SEAL.]

Endorsement: Certified copy of order of circuit court June 10, 1893, making plaintiff and defendants. Filed July 10, 1901 Louis A. Dent, register of wills.

21 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT. No. 5451.

And now comes Mira Dugan, and in answer to the notice heretofore issued to show cause why said alleged will of September 21, 1892, should not be proved and admitted to probate, and letters issued on the estate of the deceased as in and by the petition of the said John McGrane prayed, says, in answer thereto:

First. That she is a sister of the half-blood of the deceased, and resides in the city of Brooklyn, State of New York.

Second. That on February 26, 1892, the deceased made and executed her last will and testament in the city of Washington, District of Columbia, in due form of law, wherein and whereby she made the respondent and one Joseph H. McCann her executors, and devised and bequeath- all her real and personal property of which she died seized and possessed to the said McCann, as to the real property, and as to this respondent and her children all the personal property; and thereafter, and on, to wit, the 7th day of March, 1893, the said testatrix departed this life in Washington, and thereupon and in due course of time a petition was filed by this respondent setting out the various matters and things required by the rules of court, and praying that said will might be admitted to probate and record. Notice was thereupon made by publication, and in response thereto the said John McGrane, the person now asking for
the probate and record of the alleged will of September 21,
22 1892, filed his caveat thereto, and thereupon issues were
duly certified by the justice holding the probate court to the circuit court for trial by a jury; which said issues are to the court here shown. Thereafter, and on the day before the trial of the said issues aforesaid, the said John McGrane filed his petition in this court asking that said alleged will of September 21, 1892, should be admitted to probate and record.

The respondent further says that on the trial of said issues before his honor Mr. Justice Cox and a jury the sole testimony offered by the caveator in support of the seventh or last issue, and which said issues are to the court here shown, was the alleged will of September 21, 1892, and the respondent says that said alleged will last aforesaid was duly offered in evidence and read to the jury, and the alleged subscribing witnesses thereto gave their testimony at said trial in support thereof; and the respondent says that by the finding of said issues by the jury aforesaid in favor of the caveatees, the said McCann and the respondent, the caveator in said cause and the applicant now for the probate of the said alleged will of September 21st, 1892, was forever barred from setting up, claiming under, or in anywise availing himself in any capacity of any devise, bequeath, or other benefits or privilege conferred, or supposed to be conferred, under the said alleged will aforesaid; and the respondent shows that said findings so made by the jury, aforesaid, have not been reversed or any proper appeal therefrom taken, but the same remain in full force and effect.

Wherefore, the premises considered, the respondent prays the court to admit to probate the last will and testament of the decedent, under date of February 26, 1892, notwithstanding the petition filed
by the said John McGrane for the probate of the alleged will
23 aforesaid and the advertisement made in pursuance thereof.

MIRA DUGAN.

JOSEPH SHILLINGTON,
EDWIN FORREST, *Proctors.*

STATE OF NEW YORK, }
City & County of New York. }

I, Mira Dugan, being first duly sworn according to law, depose and say that I have read over the above petition by me subscribed and know the contents thereof; that the facts therein recited of my own knowledge are true, and those recited on information and belief I believe to be true.

MIRA DUGAN.

Subscribed and sworn to before me this 15th day of August, 1893.
[SEAL.] WILLIAM F. CLARE,
Notary Public, N. Y. Co.

Endorsement: Answer of Mira Dugan to citation or publication. Filed Aug. 25, 1893. L. P. Wright, register of wills.

24 STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that William F. Clare, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling
[SEAL.] in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 15 day of Aug., 1893.

HENRY D. PURROY, *Clerk.*

Endorsement: Answer of Mira Dugan to citation or publication. Filed Aug. 25, 1893. L. P. Wright, register of wills.

25 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT. No. 5451.

And now comes Mira Dugan and Joseph H. McCann, by their proctors, Messrs. Joseph Shillington and Edwin Forrest, and, for answer to the caveat filed herein by George H. Northcutt, say that while denying each and every one of the statements therein made as to the making and execution by the testatrix of her last will and testament under date of February 26, 1892, the said George H. Northcutt ought not to be permitted to file such caveat or question the regularity and validity of said will, because the same has already been passed upon and sustained by a jury on issues sent from this court to the circuit court and identical with the issues

proposed in the said caveat, which said issues are to the court here shown, and by said latter court returned, with the findings thereon, to this court; all of which steps were duly and regularly taken after due publication as required by law and the order of court in that behalf made.

The premises considered, the said Mira Dugen and Joseph H. McCann, by their proctors, move the court to strike from the files and records of the probate court said paper denominated a caveat and pass an order duly authorizing the probate and record of said will of February 26, 1892.

JOSEPH SHILLINGTON.
EDWIN FORREST.

Endorsement: Motion of Mira Dugan & Joseph McCann to strike paper denominated as caveat of Geo. H. Northcutt from files. Filed Sep. 7, 1893. L. P. Wright, register of wills.

26 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT, Otherwise Known as KATE DAVIS.

This matter came on to be heard on the 18th day of August, 1893, upon the petition of John McGrane for the probate of the paper-writing propounded by him as the last will and testament of the decedent, alleged to have been executed by her as such in the city of Brooklyn, in the State of New York, on the 21st day of September, A. D. 1892, and upon the answer of Mira Dugan to the petition of said McGrane for the probate of said paper, and to the rule of court thereon requiring all parties in interest to show cause against the probate of said paper, if any they have, and it appearing to the satisfaction of the court that at the trial of the issues in the circuit court directed by this court to be tried in relation to the paper-writing propounded by the said Mira Dugan as the last will and testament of the decedent, purporting to have been executed by her as such on the 26th day of February, 1892, the said John McGrane was plaintiff and caveator and the said Mira Dugan and Joseph H. McCann were caveatees, and defendants' said cause being civil issues numbered 34119 on the law side of this court, and it having been proved to the satisfaction of the court that at said trial the only evidence introduced by the said John McGrane in support of the issue numbered seven in that cause, which propounded to the jury the question of whether the said paper-writing of the 26th day of February, 1892, subsequent to its execution was altered or revoked by the said decedent, either in whole or in part, and, if in part only, what part or parts were so by her altered or revoked, was the said paper-writing purporting to be dated the 21st day of September, 1892, together with evidence tending to
27 prove the due execution thereof by the said decedent by her other name of Kate Davis; and it further appearing to the

court that in response to said issue the said jury found by its verdict that said paper-writing of the 26th day of February, 1892, had not been revoked in any way or part whatsoever, as appears by a copy of the said verdict certified to this court, and counsel for the said McGrane and said Mira Dugan having been fully heard upon this matter on the said 25th day of August, 1893, to which day the hearing had been adjourned, and the court, having fully considered the same, does find that the validity of the said paper-writing of the 21st day of September, 1892, so propounded by the said John McGrane as the last will and testament of Annie E. Northcutt, otherwise known as Kate Davis, was in controversy in said cause numbered 34119 between the parties to this matter, and was determined by said verdict not to be the last will and testament of the said decedent. It is therefore this 5th day of September, 1893, ordered, adjudged, and decreed that the said paper-writing purporting to bear date the 21st day of September, 1892, be, and the same is, refused and denied probate as the last will and testament of the said decedent, and the prayer of said petition of the said McGrane is overruled and denied, and the said petition is dismissed with costs, to be taxed by the clerk.

From the foregoing decree the counsel for the said John McGrane prays an appeal to the Court of Appeals of the District of Columbia not to operate as a supersedeas, and the same is granted, and the penalty of the bond for costs to be given by the appellant is fixed at two hundred dollars.

CHAS. C. COLE,
Asso. Justice.

Endorsement: Order denying and refusing probate of paper-writing dated Sept. 21, 1892. Filed Sept. 5, 1893. L. P. Wright, register of wills.

28 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of Annie E. Northcutt. No. 5451.

And now come Mira Dugan and Joseph H. McCann, by their proctors, Messrs. Joseph Shillington and Edwin Forrest, and move the court to refuse to grant a review or rehearing of the matters alleged in the petition of John McGrane as reasons for setting aside the decree heretofore passed herein by the court (Mr. Justice Cole presiding) and strike from the record and files of the probate court said petition aforesaid; and for cause therefore they assign, among other things, the following reasons:

First. Because the reasons assigned are the same that were submitted to the court as grounds for not passing the decree complained of.

Second. Because from said decree an appeal was taken to the Court of Appeals and these respondents cited to appear therein on the first day of the October term of said court, October 2nd, 1893.

Third. Because a term of said court has expired, or thirty days since the passage of the decree complained of.

Fourth. Because the proper justice to make such application to was the justice who passed the decree in question.

Fifth. Because if there is error in said decree, the parties seeking relief have elected their remedy by an appeal.

Sixth. Because the said motion was filed with the sole and only object of delay, and not in the interest of the due administration of justice, and on this latter objection they call the attention of the court to the proceedings taken herein by the said proctor of the said John McGrane.

For the reasons stated we submit that the motion of these respondents be granted.

JOSEPH SHILLINGTON,
EDWIN FORREST,
Proctors for Mira Dugan and Joseph H. McCann.

Endorsement: Motion to refuse rehearing & strike paper from files asking same. Filed Oct. 7, 1893. L. P. Wright, register of wills.

29 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of the Late ANNIE E. NORTHCUTT. No. 5451.

Brief on Behalf of Mira Dugan and Joseph H. McCann.

We respectfully submit that an order should be passed by the justice holding the probate court refusing to transmit said issues as prayed, and thereupon admit the will of February 26th, 1892, to probate and record.

JOSEPH SHILLINGTON,
EDWIN FORREST,
Attorneys for Executors.

Endorsement: Title and conclusion of brief filed by appellees as attorneys for the executors. Filed Nov. 11, 1893. L. P. Wright, register of wills.

30 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT. No. 5451.

And now come Mira Dugan and Joseph H. McCann, by their proctors, Messrs. Joseph Shillington and Edwin Forrest, and for answer to the caveat herein filed by one George H. Northcutt to the probate and record of the will and testament of the deceased under date of February 26th, 1892, and the proposed issues submitted in connection herewith say:

That, not waiving but expressly insisting upon the plea heretofore interposed by them, under date of September 29th, 1893, to the caveat filed by the said Northcutt, to the best of their knowledge, information, and belief the George H. Northcutt who files said caveat is not a son and heir of the said deceased, and was not by her begotten in lawful wedlock, as in the petition hereinbefore filed by him is alleged.

Wherefore these respondents say that before any issues can be sent to the circuit court for trial, as proposed by the said caveator, they are entitled to a trial by jury as to whether or not the said George H. Northcutt is a son and heir of the said deceased, and they respectfully pray that said issue may be framed and transmitted to the circuit court for trial.

JOS. H. McCANN.
MIRA DUGAN,
By her proctors, SHILLINGTON AND FORREST.

31 I, Joseph H. McCann, being first duly sworn according to law, depose and say that I have read over the above answer by me subscribed and know the contents thereof; that the facts therein stated of my own knowledge are true and those stated on information and belief I believe to be true.

JOS. H. McCANN.

Subscribed and sworn to before me this 27th day of March, 1894.

ALBERT H. SHILLINGTON,
[SEAL.] *Notary Public.*

Endorsement: Plea to issues proposed and caveat of George H. Northcutt. Filed Mar. 27, 1894. L. P. Wright, register of wills.

32 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of ANNIE E. NORTHCUTT. No. 5451.

And now come Mira Dugan and Joseph H. McCann and move the court to transmit to the circuit court for trial by jury the following issues:

First. Is George H. Northcutt, the caveator herein, the son of the said Annie E. Northcutt born in wedlock?

Second. If the said George H. Northcutt, the caveator, was the child of the said Annie E. Northcutt born out of wedlock, did his father afterwards intermarry with the said Annie, and did his said father acknowledge the said George H. Northcutt as his son?

On due consideration of the above motion and issues proposed, it is, this 29th day of March, 1894, by the court ordered that said issues be, and they are hereby, transmitted to the circuit court for trial.

A. B. HAGNER, *Justice.*

Endorsement: Order framing and transmitting issues as to legitimacy of caveator to the circuit court for trial by a jury. Filed Mar. 29, 1894. L. P. Wright, register of wills.

33 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of the Late ANNIE E. NORTHCUTT. In Probate Court. No. 5451.

And now comes Mira Dugan and Joseph H. McCann, by their proctors, Messrs. Shillington and Forrest, and for answer to the issues submitted to the probate court for transmission to the circuit court for trial by George H. Northcutt, say:

That, pursuant to the petition of Mira Dugan, one of the executors named in the last will and testament of the deceased, under date of February 26th, 1892, for the probate of said will and for letters testamentary to issue thereon, due publication was made to all parties interested to show cause on a day named why said will should not be admitted to probate and letters testamentary issued as prayed, and in response thereto a caveat was filed by one John McGrane, a brother of the testatrix, answer thereto made, and thereupon issues were duly transmitted to the circuit court for trial, and on trial findings of said jury were in favor of and sustained the said will of February 26th, 1892, and a duly certified copy of such findings *were* transmitted to the probate court and *are* of record among the papers in this cause; to which several papers and records herein referred to these respondents pray — to refer as part hereof for the same effect as if specially at large set forth.

And these respondents say that the findings by the jury aforesaid on the issues presented to them are binding on all the world, and the said George H. Northcutt is forever estopped and barred thereby.

34 The said Mira Dugan and Joseph H. McCann therefore object to the transmission by the probate court to the circuit court of each and every one of the issues presented by the said George H. Northcutt for such transmission, a copy of which said issues is annexed hereto as part hereof, because they say that said issues so submitted and each one of them have heretofore been passed upon by a jury, and should not be again submitted to a second jury for trial.

For the reasons aforesaid the said Mira Dugan and Joseph H. McCann request the court to refuse to transmit such issues and allow them to probate and admit to record the said last will and testament of the said Annie E. Northcutt under date of February 26th, 1892.

JOSEPH SHILLINGTON,
EDWIN FORREST,
Proctors for said Mira Dugan and Joseph H. McCann.

Endorsement: Answer of Mira Dugan and Joseph McCann to issues presented by George H. Northcutt. Filed Sep. 29, 1894. L. P. Wright, register of wills.

35 Supreme Court of the District of Columbia.

WEDNESDAY, *February* 20, 1895.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

The following case was certified to the justice holding criminal court No. 2 for trial, Mr. Justice Cole presiding:

In the Matter of the Estate of ANNIE E. NORTHCUTT, Deceased. At Law. No. 35980. Cal. 770.

It is, this 20th day of February, 1895, by the court ordered, upon motion of the caveatees, that the caveator, George H. Northcutt, shall act as plaintiff, and that the caveatees, Mira Dugan and Joseph H. McCann, who are named in the will as executors of said Annie E. Northcutt, deceased, shall act as defendants in the trial of the issues in this cause; whereupon come here as well the caveator, by his attorney, Mr. D. W. Glassie, as the caveatees, by their attorneys, Messrs. Shillington and Forrest, and a jury of good and lawful men of this District, to wit, Clemons Weston, Charles W. Lesh, Harvey Knott, Frederick G. Atkenson, L. K. Devendorf, Joseph Bertrand, J. A. Baxter, Frank A. Butts, O. L. Wolfsteiner, Edward F. Riggs, Frederick G. Barbadoes, and J. Snider Noel, who, being duly sworn, to try and true answers make to the issues sent here by the justice holding a special term of this court for orphans' court business, for trial by a jury, after hearing a part of the evidence are respited until the meeting of the court tomorrow.

Test:

[SEAL.] JOHN R. YOUNG, *Clerk.*

Endorsement: Certified copy of order of circuit court, Feb. 20, 1895, making plaintiff and defendants. Filed July 10, 1901. Louis A. Dent, register of wills.

36 In the Supreme Court of the District of Columbia.

WEDNESDAY, *February* 27*th*, 1895.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * * *

The following case was certified to criminal court No. 2 for trial, Mr. Justice Cole presiding:

GEORGE H. NORTHCUTT, Caveator & Plaintiff,
vs.
MIRA DUGAN and JOSEPH H. MCCANN, Caveatees and Defendants. } At Law. No. 35980.

Now, again come here the parties aforesaid in manner aforesaid, and the same jury return into court, and on their oath say in answer

to the first issue: Is George H. Northcutt, the caveator herein, the son of the said Annie E. Northcutt, born in wedlock? They answer, Yes. In answer to the second issue: If the said George H. Northcutt, the caveator, was the child of the said Annie E. Northcutt, born out of wedlock, did his father afterwards intermarry with the said Annie, and did his said father acknowledge the said George H. Northcutt as his son? They answer, No. And the court orders the clerk to certify said answers to that branch of the court from which said issues came.

Memorandum.

1895, February 27.—Motion for new trial filed.
1895, March 2.—Additional motion for new trial filed.

37 FRIDAY, *April* 5, 1895.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

This case was certified to criminal court No. 2 for trial, Mr. Justice Cole presiding:

In the Matter of the Estate of ANNIE E. NORTHCUTT, Deceased.
At Law. No. 35980.

This case coming on to be heard upon the motions of the caveatees for a new trial, and the same having been heard, it is considered that said motions be, and they are hereby, overruled.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing is a true copy of the answers of the jury to the issues in the above-entitled cause, and also of the order of the court overruling the caveatees' motions for new trial.

Witness my hand and the seal of said court this 20th
[SEAL.] day of April, A. D. 1895.

JOHN R. YOUNG,
Clerk Supreme Court District of Columbia.

Endorsement: Finding of jury at law No. 35980. Filed April 22, 1895. L. P. Wright, register of wills.

38 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT, Deceased.
No. 5451.

The caveatees, Mira Dugan and Joseph H. McCann, having appealed in open court to the Court of Appeals of the District of Co-

lumbia from the order made herein on June 22nd, 1895, sending up certain issues for determination by the circuit court, it is, this 22nd day of June, 1895, by this court ordered that the penalty of the bond on such appeal be, and the same is hereby, fixed at five hundred dollars.

A. B. HAGNER, *Justice.*

Endorsement: Appeal from order of June 22d, 1895, by caveatees. Bond fixed at $500. Filed June 22, 1895. L. P. Wright, register of wills.

39 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of the Late ANNIE E. NORTHCUTT. No. 5451.

On consideration of the petition of Myra Dugan and the record herein, and it appearing to the court that the last will and testament of said decedent, dated the 26th day of February, 1892, has been duly filed and the execution thereof proven by the oaths of Thomas H. Callan, Albert H. Shillington, and Joseph Shillington, the subscribing witnesses thereto, it is, this 17th day of January, 1898, ordered, adjudged, and decreed that said will be, and the same is hereby, admitted to probate and record, and it appearing further to the court that Myra Dugan and Joseph H. McCann, the parties named as executors therein, have renounced, and such renunciation has been filed herein, and requested the court that Joseph Shillington and Edwin Forrest be appointed administrators of the said estate, with the will annexed, it is further ordered, adjudged, and decreed that said Joseph Shillington and Edwin Forrest be, and they are hereby, appointed such administrators, with the said will annexed, and that letters of administration issue to them upon their giving bond in the penalty of fifteen thousand dollars, conditioned for the faithful discharge of the trust in them reposed.

A. B. HAGNER,
Asso. Justice.

Endorsement: Appointment of Joseph Shillington and Edwin Forrest administrators. Filed Jan. 17, 1898. J. Nota McGill, register of wills.

40 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of the Late ANNIE E. NORTHCUTT. No. 5451.

The petition of Joseph Shillington and Edwin Forrest respectfully represents:

That they are attorneys-at-law and represent the propounders of the will and have so represented them since the application for the probate of said document; that the said will was finally sustained

and admitted to probate and record; that they have not to this time received any fee or compensation for their services as attorneys in that behalf; that the services rendered by them cover a period of some three years and almost continuously required during said period their professional attention and time; that the abstract of the pleadings, papers filed, and docket entries in the probate court, supreme court of the District of Columbia, and Court of Appeals, hereto attached and made a part hereof, give some idea of the work done by them and the amount thereof; that said case was twice tried in the supreme court of the District of Columbia before a jury and was heard on three several occasions in the Court of Appeals of the District of Columbia; that in the course of preparing said cases for trial in the supreme court by the caveators numerous depositions were taken on interrogatories, requiring the filing of cross-interrogatories by your petitioners; that the petitioners were also required to personally visit Philadelphia and Providence, Rhode Island, for the purpose of being present at the taking of important depositions by the caveators, and the expenses of said trips have been personally borne by the petitioners; that on each occasion in the Court of Appeals the petitioners prepared briefs, and in one of the cases the same was orally argued, as also on the trials in the supreme
41 court of the District of Columbia; that, as shown by said abstract of proceedings in the probate court, briefs were also prepared by them on several occasions on points raised during the course of the litigation in the probate court.

Your petitioners further say that a fee of $3,000 for such services and work done would be, in their opinion, but a reasonable and fair compensation therefor, and they attach hereto, as part hereof, the affidavits of Wm. J. Miller and Andrew B. Duvall as to the reasonableness of said fee.

The premises considered, they pray that an order may be made herein granting them said allowance and authorizing the administrators to pay the same.

JOSEPH SHILLINGTON.
EDWIN FORREST.

Subscribed and sworn to before me this 10th day of January, 1899.

ALBERT H. SHILLINGTON,
[SEAL.] *Notary Public.*

42 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of the Late ANNIE E. NORTHCUTT.
No. 5451.

William J. Miller, being first duly sworn according to law, deposes and says that he is a member of the bar of the supreme court of the District of Columbia, and has read over the petition of Joseph Shillington and Edwin Forrest for the allowance of a fee or compensation for their services as attorneys for the propounders of the

will of the late Annie E. Northcutt, as also the abstract of the pleadings, papers filed, and docket entries in the probate court, supreme court of the District, and the Court of Appeals; that a fee of $3,000 for the work done by them and services rendered would be but a fair and reasonable compensation for such services.

WILLIAM J. MILLER.

Subscribed and sworn to before me this 10th day of January, 1899.

[SEAL.] ALBERT H. SHILLINGTON,
Notary Public.

43 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of the Late ANNIE E. NORTHCUTT.
No. 5451.

A. B. Duvall, being first duly sworn according to law, deposes and says that he is a member of the bar of the supreme court of the District of Columbia, and has read over the petition of Joseph Shillington and Edwin Forrest for the allowance of a fee or compensation for their services as attorneys for the propounders of the will of the late Annie E. Northcutt, as also the abstract of the pleadings, papers filed, and docket entries in the probate court, supreme court of the District, and the Court of Appeals; that a fee of $3,000 for the work done by them and services rendered would be but a fair and reasonable compensation for such services.

A. B. DUVALL.

Subscribed and sworn to before me this 9 day of January, 1899.

[SEAL.] EDWARD G. NILES,
Notary Public, D. C.

44 *In re* Estate of ANNIE E. NORTHCUTT. 5451.

Memoranda.

March 8, 1893. Will filed, with petition of Mira Dugan for appointment of collectors, Joseph Shillington and Edwin Forrest.

March 8, 1893. Order appointing Joseph Shillington and Edwin Forrest collectors; bond, $40,000.

March 9, 1893. Bond executed *ad collegendum* issued.

March 20, 1893. Petition of Mira Dugan for probate of will and letters of administration *c. t. a.* to issue to Joseph Shillington and Edwin Forrest filed.

March 20, 1893. Report of collectors filed.

March 20, 1893. Renunciation of Joseph H. McCann and Myra Dugan, executors, filed.

March 20, 1893. Inventory of personal property, $26,232.25, and of money, $2,663.62, collected by collectors.

March 20, 1893. Order authorizing collectors to pay certain debts of deceased, &c.

March 20, 1893. Order of publication issued, returnable April 14, 1893.

April 14, 1893. Affidavit of Edwin Forrest and proof of publication filed.

45 April 14, 1893. Caveat of John McGrane to will of February 26th, 1892, and petition that issues be sent to jury.

April 21, 1893. Answer to caveat of John McGrane by propounder of will.

April 21, 1893. Issues made up and transmitted to circuit court for trial on caveat of John McGrane (law, 34119).

April 28, 1893. Report of collectors filed and order allowing them to pay certain sums of money.

May 5, 1893. Report of collectors filed and order to pay $660 interest on $23,000 on note.

June 2, 1893. Report of collectors filed and order to pay $225 rent and note of $200 and interest.

June 19, 1893. Petition of John McGrane for probate of will of September 21, 1892, and will filed.

June 21, 1893. Affidavit of Mary J. McGrane in relation to will of September 21, 1892, filed.

June 25, 1893. Caveat filed by George H. Northcutt to will of Annie E. Northcutt.

June 30, 1893. Finding of jury sustaining will filed.

July 1, 1893. Report of collectors filed and order to pay note and rent.

July 21, 1893. Order to show cause at the instance of John McGrane why will of September 21, 1892, should not be admitted to probate and record.

46 July 21, 1893. Order of publication in Law Reporter and New York Herald, returnable August 18, 1893, and cancelled.

July 21, 1893. Above order annulled.

July 24, 1893. Upon argument of parties and due consideration by the court, order of July 21, 1893, reinstated.

July 28, 1893. Report of collectors filed and order to pay taxes, &c.

July 28, 1893. Order endorsed on motion filed July 21 refusing to grant prayers of said motion.

August 11, 1893. Petition of George B. Van Kenren, of R. F. Harvey's Sons, undertakers, and order to pay funeral bill of $520.

August 18, 1893. Order extending time to Mira Dugan to show cause why will of September 21, 1892, should not be admitted to probate and record.

August 18, 1893. Answer of George H. Northcutt to order of July 21, 1893, why will of September 21, 1892, should not be admitted to probate and record.

August 25, 1893. Caveat to wills of Kate Davis by George H. Northcutt.

August 25, 1893. Caveat to both wills by George H. Northcutt filed.

August 25, 1893. Answer of Mira Dugan to notice of July
47 21, 1893, to show cause why will of September 21, 1892, should not be admitted to probate and record.

August 30, 1893. Motion of John McGrane to expunge from files answer of Mira Dugan of August 25, 1893, to show cause, &c.

September 1, 1893. Briefs of Mira Dugan and John McGrane with reference to authorities filed.

September 1, 1893. Proofs of publication in Washington Law Reporter and New York Herald filed.

September 1, 1893. Brief on behalf of John McGrane (10 pp.).

September 5, 1893. Order of Justice Cole denying and refusing probate of paper-writing dated September 21, 1892, and appeal noted, but not to operate as a supersedeas.

September 5, 1893. Order overruling motion of John McGrane to strike from the files answer of Mira Dugan, setting forth the reasons why paper-writing of September 21, 1892, should not be admitted to probate and record. Appeal allowed, not to operate as a supersedeas appeal bond; $200.

September 7, 1893. motion of Mira Dugan and McCann to strike paper denominated caveat of George H. Northcutt from the files.

September 8, 1893. Citation on appeal. Service acknowledged and filed and continued one week.

September 21, 1893. Motion to strike out and return to circuit court for correction alleged findings of jury on issues 1, 2, 3, 4, 5, & 6 framed on caveat of John McGrane.

September 27, 1893. Proposed issues filed by D. W. Glassie.
48 September 29, 1893. Answer of Mira Dugan and Joseph H. McCann to issues submitted for transmission to circuit court for trial by George H. Northcutt.

September 29, 1893. Petition of George H. Northcutt to strike out certain issues 1, 2, 3, 4, 5, and 6, passed upon in the McGrane case.

October 6, 1893. Petition of John McGrane for review, &c., of decree of September 5, 1893.

October 7, 1893. Motion on behalf of Mira Dugan and Joseph H. McCann to refuse rehearing and strike from files paper asking for the same.

October 10, 1893. Order of Mr. Justice Hagner refusing to review decree of Mr. Justice Cole of September 5, 1893.

October 16, 1893. Petition of John McGrane for allowance of costs and counsel fees (6 pp.).

November 3, 1893. Brief in support of petition of John McGrane of October 16, 1893, for allowance of costs and counsel fees.

November 3, 1893. Order endorsed on petition of John McGrane refusing prayers therein.

November 3, 1893. Brief and authorities in support of reasons filed by Mira Dugan why alleged will of September 21, 1892, should not be admitted to probate (7 pp.)

49 November 6, 1893. Order allowing John McGrane to prosecute petition for probate of alleged will, without deposit or security for costs, and affidavit filed.

November 6, 1893. Motion by John McGrane to prosecute appeal without giving security.

November 9, 1893. Mandate of Court of Appeals dismissing appeal of John McGrane filed.

November 11, 1893. Brief of 20 pages by Dugan and McCann against submission of issues on application of Northcutt on the ground that they had already been submitted and passed upon by a jury.

November 11, 1893. Written opinion of Mr. Justice Hagner filed.

November 16, 1893. Motion for rule to sell lease and allowance to prosecute suits and will filed.

November 21, 1893. Report of collectors filed and order of sale of personal property and leasehold.

November 23, 1893. Order of Mr. Justice Hagner refusing consideration of petition of October 16, 1893.

November 28, 1893. Mandate withdrawn and order reinstating appeal of John McGrane filed.

Dec. 8, 1893. Affidavit of L. A. Bailey and J. J. Johnson and report of collectors filed.

Dec. 15, 1893. Order authorizing collectors to sell personal property.

June 5, 1894. Report of collectors' order to pay certain money and petition of Willie Gilmore filed.

50 Jan. 12, 1894. Order denying petition.

Feb. 20, 1894. Report of collectors filed and order to accept private bid of $500 for wearing apparel.

March 27, 1894. Opinion of Mr. Justice Hagner filed.

March 27, 1894. Plea to issues proposed on caveat of George H. Northcutt on the ground that he was not a son of the decedent.

March 29, 1894. Order framing and transmitting issues for trial as to legitimacy of George H. Northcutt.

July 6, 1894. Report of collectors filed.

Feb. 15, 1895. Petition of W. Gilmore in reference to piano filed.

April 3, 1895. Report of collectors filed.

April 19, 1895. Order authorizing collectors to accept offer of Beula Lyles.

April 22, 1895. Findings of jury, at law 35980, that George H. Northcutt is the son of Annie E. Northcutt, and motion for new trial overruled, filed.

May 22, 1895. Notice of motion to call up issues on behalf of Northcutt.

May 24, 1895. Order directing return of caveators' issues for revision and receipt filed.

51 May 27, 1895. Proposed issues of George H. Northcutt filed.

June 7, 1895. Order that caveator show cause why issues should not be submitted by June 14, 1895.

June 22, 1895. Issues on behalf of Northcutt submitted.

June 22, 1895. Order certifying issues to circuit court on caveat of Northcutt to will of February 26, 1892.

June 22, 1895. Order fixing bond of $500 on appeal by *F*ugan and McCann from order of June 22, 1895.

June 24, 1895. Order allowing certain issues to be transmitted and refusing others; appeal by caveator.

July 12, 1895. Appeal bond, $500, filed.

Oct. 29, 1895. Order allowing withdrawal of brief of George H. Northcutt.

Dec. 21, 1895. Mandate from Court of Appeals filed.

Dec. 10, 1896. Will proved by one witness (will dated Feb. 26, 1892).

Dec. 11, 1896. Will fully proved.

Jan. 13, 1896. Account sales of part of personal estate filed; inventory sales, $33; John McGrane, folio 444.

Jan. 14, 1896. First and final account of collectors approved
52 and passed accounts # 38, John McGrane, # 368.

Jan. 17, 1896. Order admitting will to probate and record and granting letters of administration *c. t. a.* to Joseph Shillington and Edwin Forrest.

Jan. 17, 1896. Bond executed and letters issued; notice to creditors issued; bond, $15,000.

April 2, 1896. Letter from Wolf and Rosenburg filed.

April 25, 1896. Petition of administrators for an order to correct record filed.

April 25, 1896. Order amending record to read and all proceedings shall and may be considered as having been taken in the matter of the estate of Annie E. Northcutt, otherwise Estelle Horton.

53 In the Matter of the Estate of ANNIE E. NORTHCUTT. No. 35980.

1894.

April 3. Deposit toward costs by Padgett & Forrest; order and copy of issues filed.

May 21. Interrogatories to be propounded to E. M. Butcher for caveator filed.

" " Interrogatories to be propounded to John McGrane for caveator filed.

" " Interrogatories to be propounded to Mary J. McGrane for caveator filed.

June 2. Cross-interrogatories (3) to be propounded to said witnesses and objections to direct interrogatories filed.

June 5. Objections (3) to cross-interrogatories propounded to said witnesses filed.

" 6. Motion to appoint special commissioners to take depositions filed.

" 7. Order to issue commission to Frank H. Kinney to take depositions of Mrs. E. M. Butcher for caveator (M. 29, p. 222) and commission issued.

" 7. Order to issue commission to Dennis H. Sheahan to take depositions of Jno. McGrane for caveator (M. 29, p. 222) and commission issued.

" 7. Order to issue commission to Chas. N. Camp to take deposition of Mary J. McGrane for caveator (M. 29, p. 222) and commission issued.
" 7. Objections to orders to commissions, &c., filed.
" 13. Motion for continuance and notice.
" 15. Affidavits (2) support, motion 4 exhibits filed, jurant.
" 15. Depositions from F. H. Kinney, Hamilton Co., Ohio, filed.
Oct. 2. Affidavit of Geo. H. Northcutt filed.
" 12. Motion to suppress depositions filed.

54

1894.
Oct. 13. Answer of collectors filed.
" 13. Motion for rule on collectors filed and overruled and leave to Geo. H. Northcutt to withdraw affidavit filed Oct. 2, 1894 (M. 29, p. 444).
" 20. Motion to suppress depositions overruled.
Nov. 1. Affidavit of D. W. Glassie, attorney, filed.
1895.
Jan. 8. Deposition of Mary J. McGrane received and filed.
" 16. Motion for commission to issue to Edwin King, of Middletown, Connecticut, to take deposition of Mary J. McGrane as witness for caveator filed.
" 19. Commission ordered to issue to Edwin King, Middletown, Connecticutt, to take depositions of Mary J. McGrane on behalf of caveator (M. 31, p. 152).
" 19. Commission issued as ordered.
" 21. Interrogatories to be propounded to —— McGrane, of Providence, Rhode Island, filed.
Feb. 2. Notice of motion for issuing commission to take depositions filed.
" 4. Commission returned not executed.
" 6. Order directing commission to issue to Samuel T. Douglas, Providence, Rhode Island, to take deposition of Catherine McGrane, Lawrence McGrane, Catherine McWeeny, of Providence, Rhode Island, on behalf of caveator (M. 31, p. 201).
" 6. Objection to interrogatories filed.
" 18. Depositions from Samuel T. Douglas received and filed (commissioner's fee, $10.52).
" 20. Motion by caveatees to make parties plaintiff and defendant filed.
" 20. Order making Geo. H. Northcutt plaintiff and Mira Dugan and Jos. H. McCann defendants (M. 31, p. 237).
" 20. Jury sworn and respited (M. 31, p. 237).
" 20. Caveator's witnesses, Wm. C. Palmer, Thomas Dever, Jas. W. Fleming, (1) day each.

55

1895.

Feb. 21–25. Jury again respited (M. 31, p. 240–247).
" 26. Order for sealed verdict (M. 31, p. 248).
" 27. Verdict finding issues in favor of caveator (M. 31, p. 252).
" 27. Motion for new trial filed and entered (M. 31, p. 252).
Mar. 2. Motion (add.) for new trial filed and entered (M. 31, p. 256).
Apr. 1. Motion for new trial continued to April term (M. 31, p. 302).
" 1. Term prolonged 30 days to settle exceptions (M. 31, p. 308).
" 5. Motion for new trial overruled (M. 31, p. 324).
" 11. Appeal by caveatees and order to issue citation filed.
" 11. Citation, writ of, and copy issued.
" 12. Citation, writ of, returned service accepted by attorney for appellees.
" 22. Copy of answers certified to orphans' court.

56 *In re* Estate of ANNIE E. NORTHCUTT. No. 34119.

1893.

April 24. Deposit toward costs, $10, by L. A. Bailey; order and copy of issues filed.
June 10. Motion for commission to take depositions and affidavits filed; jurat.
" 17. Deposition of Rosa Mason received and filed.
" 10. Ordered that in the trial of said issues Jno. McGrane be made party plaintiff and Jos. McCann and Mira Dugan be made parties defendants (M. 22, p. 338).
" 20. Jury sworn and respited. See Witness Book, p. 76 (M. 22, p. 345).
" 20. Verdict sustaining will (M., p. 345).
" 22. New trial, motion for, filed and entered (M. 22, p. 347).
" 24. New trial, motion for, aff't of L. A. Bailey support of, filed.
" 24. New trial, motion for, overruled (M. 22, p. 348).
" 24. Appeal by caveator to Court of Appeals, notice of, filed.
" 30. Copy of issues certified to orphans' court.
" 26. Citation, writ of and copy of, issued.
" 30. Citation, writ of, and copy of service accepted.
Nov. 9. Mandate from Court of Appeals of the District of Columbia dismissing appeal at costs of Jno. McGrane, caveator, filed.

57 Court of Appeals.

In re Estate of ANNIE E. NORTHCUTT. 271.

November 6, 1893. Motion to docket and dismiss appeal filed.
November 6, 1893. Certificate of register of wills filed.
November 6, 1893. Appeal docketed and dismissed with costs.

November 9, 1893. Mandate issued.
November 9, 1893. Motion to vacate order of November 6 filed.
November 9, 1893. Motion to vacate order of November 9 submitted.
November 20, 1893. Motion to vacate order of November 6 granted.
November 28, 1893. Certified copy of order of November 20, 1893, sent to supreme court of the District of Columbia.

58 JOHN MCGRANE *vs.* MIRA DUGAN. } 275.

Dec. 1, 1893. Transcript of record received and filed.
Dec. 1, 1893. Appearance of L. A. Bailey for appellant filed.
Dec. 2, 1893. Appellant's statement of errors and facts of record to be printed.
December 8, 1893. Motion to dismiss.
Dec. 8. 1893. Motion to dismiss submitted.
Dec. 11, 1893. Appellant's brief on motion to dismiss filed.
Dec. 13, 1893. Appellant's brief in support of motion to dismiss filed.
Jan. 17, 1894. Appeal dismissed with costs.
Jan. 17, 1894. Opinion of chief justice filed.
Feb. 12, 1894. Mandate.

59 MIRA DUGAN and JOSEPH H. MCCANN *vs.* GEORGE H. NORTHCUTT. } 507.

Sept. 7, 1895. Transcript of record.
Sept. 9, 1895. Appearance of J. S. and E. F. for appellants.
Oct. 2, 1895. Appearance of D. W. Glassie and Henry H. Glassie for appellee.
Oct. 7, 1895. Petition for allowance of appeal submitted.
Oct. 9. Petition for allowance of appeal granted.
Oct. 17, 1895. 10 copies printed record received.
Oct. 28, 1895. Addition to record per stipulation of counsel.
Oct. 30, 1895. 10 copies addition to record received.
Nov. 1, 1895. Appellee's motion to dismiss.
Nov. 4, 1895. 15 copies appellee's brief.
Nov. 4, 1895. 15 copies appellants' brief.
Nov. 4, 1895. Suggestion of diminution of record.
Nov. 4, 1895. Motion to dismiss argued and submitted.
Nov. 5, 1895. Motion to dismiss appeal overruled.
60 Nov. 5, 1895. 15 copies appellee's brief.
Nov. 5, 1895. Argument commenced.
Nov. 5, 1895. Argument concluded.
Dec. 3, 1895. Order reversed with costs, &c., in so far as it directs certain issues to be transmitted for jury trial and remanded for further proceedings, &c.

Dec. 3, 1895. Opinion of Mr. Justice Morris.
Dec. 6, 1895. Motion for revoking (typewritten).
Dec. 7, 1895. Reasons of appellant why an argument should be denied.
Dec. 9, 1895. Motion for rehearing denied.
Dec. 9, 1895. Opinion by Mr. Justice Morris.
Dec. 21, 1895. Mandate issued.

Endorsement: Petition for allowance of counsel fees. Filed Jan. 10, 1899. J. Nota McGill, register of wills.

61 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of the late ANNIE E. NORTHCUTT. No. 5451.

On consideration of the petition of Joseph Shillington and Edwin Forrest, and the affidavits accompanying the same, for allowance of compensation as attorneys representing the executors under the last will and testament of the decedent, and it appearing to the court that the sum of three thousand dollars is a reasonable compensation for the services rendered by them in that behalf, it is this tenth day of January, 1899, by the court ordered and decreed that the administrators *c. t. a.* be, and they are hereby, authorized and directed to pay said sum of three thousand dollars to the said Joseph Shillington and Edwin Forrest out of the assets of the estate of the decedent.

It is further ordered that said administrators be, and they are hereby, authorized to offer, after due advertisement, either at public or private sale, for cash the personal property of the decedent; provided that no offer or bid for the same at private sale shall be accepted by said administrators at a valuation less than the appraised one without the especial authority of the court first had in the premises.

A. C. BRADLEY, *Justice.*

Endorsement: Order allowing fee and authorizing sale of personal property. Filed Jan. 10, 1899. J. Nota McGill, register of wills.

62 In the Supreme Court of the District of Columbia, Holding an Orphans' Court.

In re Estate of ANNIE E. NORTHCUTT. No. 5451, Administration.

To the supreme court of the District of Columbia, holding an orphans' court:

The petition of John A. Hamilton, receiver of the assets of the late firm of James L. Barbour & Son, with leave of court first had and obtained; Benjamin H. Stinemetz and Samuel W. Stinemetz, partners trading as B. H. Stinemetz & Son; Edwin Harris and

Charles Shafer, late partners trading as Harris & Shafer; Henry O. Towles, Julius Lansburgh, to the use of Gustave and James Lansburgh, partners trading as Lansburgh & Brother; Henry H. Jacobs and Montague J. Jacobs, late partners trading as Jacobs Brothers, and Israel Stein respectively shows:

1. That they are all citizens of the United States and residents of the District of Columbia.

2. That at the time of the death of the said Annie E. Northcutt, as hereinafter stated, she was indebted to your petitioners respectively on account of merchandise sold and delivered by them to the said Annie E. Northcutt in her lifetime in the following amounts, to wit: To the late firm of Barbour & Son, of which the petitioner John A. Hamilton is receiver, the sum of $2,247.32; to the said B. H. Stinemetz

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& Son in the sum of $242.90; to the said Harris & Shafer in the sum of $165.00; to the said Henry O. Towles on account $62.53 and on note $3,000—in the sum of $3,062.53; to the said Lansburgh & Brother in the sum of $742.75, and to the said Shafer Brothers in the sum of $250.00; to Israel Stein, $150 & interest, for which
63 said several amounts your petitioners severally presented their claims, duly proved as required by law, and the same were duly approved by the justice holding this honorable court and duly recorded in the docket of claims in this honorable court as just and proper claims against the estate of said deceased, and said several claims have never been disputed or questioned.

3. That heretofore, to wit, on March 7, 1893, the said Annie E. Northcutt, whose original name was Kate or Catherine McGrane, being indebted to your petitioners as aforesaid, departed this life in the city of Washington possessed of certain estate, real and personal, leaving a last will and testament dated February 26, 1892, whereby she bequeathed her personal estate to her half-sister, Mira Dugan, and the daughters of said Mira Dugan, residents of Brooklyn, State of New York, and devised her real estate to Joseph H. McCann, and in and by said last will and testament named said Mira Dugan and Joseph H. McCann as executors thereof.

4. That thereafter, to wit, on the 20th day of March, 1893, the said Mira Dugan filed her petition in this honorable court, in which she prayed for the probate of said will, renounced her appointment as executrix, and asked for letters of administration, with the will annexed, to be granted to Joseph Shillington and Edwin Forrest; that in said petition the next of kin of said deceased were stated to be her

2.

two brothers, Lawrence McGrane, of Providence, Rhode Island; John McGrane, of Brooklyn, State of New York; a half-sister named Margaret Kelly, residing in Ireland, and the petitioner, Mira Dugan, also a half-sister; and at the time of filing said petition the said Joseph H. McCann likewise renounced his appointment as executor under said will.

5. That thereafter John McGrane, one of the brothers of said deceased and of said Mira Dugan, appeared and filed a caveat to said will; that about said time or soon thereafter another document was deposited in the office of the register of wills purporting to be a last will and testament executed by Kate Davis, at Brooklyn, in the State of New York, on September 21, 1892, which was claimed to have been made by said deceased under one of the numerous names she bore, in and by which instrument the testatrix named therein purported to revoke all previous wills made by her, and to bequeath two-thirds of her estate to her brother Lawrence McGrane and one-third to her brother, the said John McGrane.

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6. That in pursuance of the caveat to the will dated February 26, 1892, filed by the said John McGrane, issues were formulated and transmitted to the circuit court of the District of Columbia for trial by jury, the caveator, John McGrane, being made the plaintiff, and the caveatees, Joseph H. McCann and Mira Dugan, being made defendants.

7. That on August 25, 1893, one George H. Northcutt filed a petition in this honorable court, wherein he alleged that he was the only child and sole heir-at-law of the said deceased, and asked leave to file his caveat against the probate of said will of February 26, 1892.

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8. That such proceedings were had in this cause as finally resulted in the refusal by the court to admit to probate the alleged will dated September 21, 1892, and thereafter, to wit, on the 17th day of January, 1896, in admitting the probate and record of will dated February 26, 1892.

9. That pending the controversy over said wills, to wit, on the 9th day of March, 1893, the said Edwin Forrest and Joseph Shillington were appointed collectors, who, in virtue thereof, possessed themselves of the assets and effects of said deceased, and thereafter, to wit, on the 14th day of January, 1898, the first and final account of said Forrest and Shillington, as collectors, was approved and passed by this honorable court, which showed that at that time the said collectors had on hand jewelry and other personal property of said deceased of the appraised value of $8,094.50 and cash, being the proceeds of certain personal property, amounting to $2,063.20; that thereafter, to wit, on the 17th day of January, 1898, the said Edwin Forrest and Joseph Shillington were appointed administrators of the estate of said deceased with said will of February 26, 1892, annexed, and thereupon turned over to themselves and have ever since held the personal estate aforesaid as such administrators.

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10. That said Edwin Forrest and Joseph Shillington were the attorneys of said Mira Dugan and Joseph H. McCann, beneficiaries under said will of February 26, 1892, and appeared in these proceedings for and on behalf of said persons and resisted the efforts made to vacate said will; and thereafter, to wit, on the 10th day of January, 1899,

said Edwin Forrest and Joseph Shillington filed their petition in this honorable court and procured an order based thereon for the allowance

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of three thousand dollars as counsel fees, as recited by said order, "for compensation as attorneys representing the executors under the last will and testament of the deceased," and authorizing the payment of said sum "out of the assets of the testator," which said order was procured *ex parte* and without notice to your petitioners or any of them, and your petitioners had no notice of said order or of said allowance to said attorneys until within the past ten days or two weeks.

11. Your petitioners further represent that the total claims against the estate of said deceased duly filed and probated in this honorable court aggregate about $8,500; that the personal estate on hand and undisposed of consists almost wholly of diamonds and, in the opinion of your petitioners, cannot be sold for more than 50 or 60 per cent. of the appraised value thereof, by reason of which fact, if said attorneys are permitted to deduct from the assets of said deceased the allowance in their favor aforesaid, together with their compensation as administrators and the expenses of administration, the assets of said deceased applicable to the payment of debts will be reduced more than one-half, and your petitioners will receive upon their several claims a very much less percentage than would otherwise be received by them.

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12. Your petitioners further represent that said Edwin Forrest and Joseph Shillington were allowed the usual and full commissions as collectors upon the entire assets coming into their hands as collectors.

13. Your petitioners are advised and accordingly aver that said order making an allowance of $3,000 to said Edwin Forrest and Joseph Shillington for services as attor-

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neys, as aforesaid, should be vacated and set aside and the payment of said claim out of the assets of said deceased refused for the following, among other, reasons:

(*a.*) Because said order was obtained *ex parte* and without notice to your petitioners or any of them.

(*b.*) Because said order was improvidently granted and under a misapprehension as to the facts, the petition of said attorneys and the order based thereon reciting that the services rendered by them and the allowance therefor was as compensation to them as attorneys "representing the *executors* of the last will and testament of the testator," whereas, in fact, the services were rendered on behalf of Mira Dugan and Joseph H. McCann, who renounced their appointment as executor and executrix prior to the rendition of said services.

(*c.*) Because the services rendered by said attorneys were rendered for Mira Dugan and Joseph H. McCann as beneficiaries under said will.

(*d.*) Because said services were not for the benefit of said estate.

(*e.*) Because the court was without authority to allow any such expense as a charge against the assets of said deceased, inasmuch as said services were not rendered for or incurred by the executors, there being no executors, and were not incurred "in the recovery or security of any part of the estate."

67 (*f.*) Because the caveats to said will were filed and all services rendered by said attorneys were rendered before the admission of said will to probate and record.

(*g.*) Because said services were not rendered for

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and in behalf or at the request of your petitioners or any of them, whereas the allowance was made out of the assets of said decedent to which your petitioners are justly entitled.

(*h.*) Because if paid out of the assets of the estate, it will reduce the amounts of the payments to be made to your petitioners.

(*i.*) Because the court was without authority in law to pass an order allowing the payment to said attorneys out of the assets of the testatrix of any sum whatever on account of services rendered by said attorneys on behalf of said Mira Dugan and Joseph H. McCann.

14. Your petitioners further represent that substantially the only personal estate, aside from money remaining in the hands of administrators and undisposed of, consist- of certain diamonds of uncertain value, and they are informed and believe that it is essential for the full protection of their interest that no sale thereof should be made without first submitting the same to this honorable court for approval after due notice to them.

15. That the real estate of which said testatrix died seized has been all sold under the trust thereon and failed to realize more than the amount of lien thereon.

Wherefore your petitioners pray:

First. That the order heretofore passed herein authorizing the payment of the sum of $3,000 out of the assets of said deceased to said Edwin Forrest and Joseph Shillington be vacated and set aside and the application for said allowance be wholly refused.

Second. But if the court shall be of the opinion, as a matter of law, that said Edwin Forrest and Joseph Shillington are
68 entitled to charge the assets of said deceased for the services rendered by them or any part thereof, then that

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appropriate issues may be framed for transmission for trial by jury to ascertain the extent and value of such service.

Third. That an order may be passed forbidding the sale of the diamonds in the possession of the administrators except pursuant to the approval of the court after due notice to the petitioners.

Fourth. And for such other and further relief as the nature of

the circumstances of the case require and to this honorable court seem proper.

JOHN A. HAMILTON, *Receiver.*
B. H. STINEMETZ & SON,
By B. H. STINEMETZ.
HARRIS & SHAFER,
By EDWIN HARRIS.
ISRAEL STEIN,
By LEON TOBRINER, *Att'y.*

CLARENCE A. BRANDENBURG,
Att'y for Hamilton, Stinemetz & Son, & Harris & Shafer.
WOLF & ROSENBERG,
Attorneys for Lansburg & Bro. and Henry H. Jacobs and Montague J. Jacobs, Lately Trading as Jacobs Bros.
W. E. EDMONSTON,
Att'y for Henry O. Towles.
LEON TOBRINER,
Att'y for Israel Stein.

DISTRICT OF COLUMBIA, *ss:*

John A. Hamilton, receiver of the assets of the firm of James L. Barbour & Son; Benjamin H. Stinemetz, a member of the firm of B. H. Stinemetz & Son; Edwin Harris, a member of the late firm of Harris & Shafer, upon oath say they have read the foregoing petition by them subscribed in manner aforesaid and know the contents thereof; that the facts therein stated upon personal knowledge are true, and those stated on information and belief they believe to be true.

[SEAL.]

JOHN A. HAMILTON.
B. H. STINEMETZ.
EDWIN HARRIS.

Subscribed and sworn to before me this 11th day of October, 1899.
F. WALTER BRANDENBURG, JR.,
Notary Public, D. C.

69 Endorsement: Petition of John A. Hamilton *et al.* to vacate order allowing counsel fees out of the estate. Filed Oct. 14, 1899. Louis A. Dent, register of wills.

70 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT. No. 5451, Administration.

And now come the respondents, Joseph Shillington and Edwin Forrest, and, in answer to the petition heretofore filed by John A. Hamilton as receiver and others, say:

First. They admit the allegations of the first paragraph of said petition.

Second. In answer to the allegations of the second paragraph of said petition, these respondents say that whether or no the decedent was indebted as therein alleged they are not informed save by the allegations of said paragraph and the fact that the said petitioners have presented their respective claims against the estate of the decedent and filed the same in the office of the register of wills, and, if the fact be deemed material to the interests of these respondents in the matter set forth in said petition, they demand strict proof thereof.

Third. In answer to the allegations of the third paragraph of said petition, these respondents refer to their answer to the second paragraph thereof, and further say that as to the contents of the last will and testament referred to in said paragraph they refer for greater certainty to the said last will and testament, which appears of record in this court.

Fourth. Answering the allegations of the fourth paragraph of said petition, these respondents say that it is true, as therein
71 alleged, that on, to wit, the 20th day of March, 1892, Mira Dugan filed her petition in this court, in which she asked for the probate of the last will and testament of the decedent, dated February 26, 1892, and in and by her said petition filed a renunciation as executrix thereunder, as likewise Joseph H. McCann as executor thereunder; but said renunciations were not acted upon by the court or otherwise until the appointment of the respondents as administrators with the said will annexed.

Fifth. These respondents for answer to the fifth paragraph of said petition refer to the papers and documents therein referred to for the contents.

Sixth. In answer to the allegations of the sixth paragraph of said petition, these respondents, for greater certainty, refer to the records of the court therein named, and also say that in a trial of the said controversy the said persons named as executrix and executor respectively in said last will and testament, dated February 26, 1892, were made parties defendant in the said controversy as the executors named in the said last will and testament.

Seventh. These respondents for answer to the seventh paragraph of said petition refer to the papers and records of this court for greater certainty as to the matters therein set forth.

Eighth. In answer to the allegations of the eighth paragraph of said petition, these respondents likewise refer to the papers and records in this court for the true statements of the contents of the matters therein referred to.

Ninth. In answer to the statements contained in the ninth paragraph of said petition, these respondents say that as to the
72 matters therein alleged and set forth they refer for greater certainty to the papers and records on file in this court and therein referred to.

Tenth. These respondents, in answer to the allegations in the

tenth paragraph of said petition, say they refer to the matters of record in this cause as to the facts therein referred to and as to so much of said paragraph as alleges, to wit: "That said Edwin Forrest and Joseph Shillington were the attorneys of said Mira Dugan and Joseph H. McCann, beneficiaries under said will of February 26, 1892, and appeared in these proceedings for and on behalf of said persons and resisted the efforts made to vacate said will," and these respondents say that they appeared as attorneys for the parties named as executrix and executor respectively in defending said will, and they further say that the records of said court will show the contents of the petition filed by them and therein referred to, to which they refer for greater certainty.

They further say that at the time of the procurement of said order for the payment of compensation to them as attorneys the same was duly published through the ordinary channels and was made a matter of record in the said court, and that at said time the only parties who appeared upon the dockets of said court as attorneys of record were those who appeared in the contest over the will controversy, and that these respondents submitted the matter of their compensation to the court (Mr. Justice Bradley presiding), and the matter of the allowance of said compensation was well known or should have been to petitioners by reasonable diligence, but no action with reference thereto was taken until the filing of the petition herein, more than six months thereafter, and after in the meantime with full knowledge or information on the part of the petitioners or their solicitors that such action had been taken by Mr. Justice Bradley.

73 Eleventh. Answering the allegations of the eleventh paragraph of said petition, these respondents say that as to the amount of debts and number of creditors of the decedent they refer to the records of this cause for greater certainty, as to the claims of the creditors of the decedent.

For further answer to the allegations of said paragraph these respondents say that the other matters therein alleged are mere matters of argument, which they are not called upon for answer.

Twelfth. In answer to the allegations of the twelfth paragraph of said petition, these respondents say that they were allowed the usual reasonable and lawful commissions permitted and authorized by law as collectors of the estate of the testator.

Thirteenth. Answering the allegations of the thirteenth paragraph of said petition and the various subdivisions under said paragraph, these respondents say that the order authorizing the payment of compensation to them as solicitors should not be vacated and set aside for any of the reasons set forth in the thirteenth paragraph of said petition, and they further say that none of the matters therein alleged constitute any valid, reasonable, or good excuse for setting aside and vacating the order therein referred to.

They specifically deny the statements that the allowance made to them as compensation as attorneys was not made as attorneys representing the executrix and executor of the last will and testament of the testator.

They further specifically deny that the services rendered by these respondents were rendered for Mira Dugan and Joseph H.
74 McCann as beneficiaries under the will referred to, and say that said services were rendered to the executrix and executor under the last will and testament of the decedent, and that such services were in defence of the will and for the benefit of the estate.

And for further answer to said paragraph these respondents say that it is not true, as therein alleged, that at the date of the rendition of the services by them there were no executors named or nominated in the last will and testament of the decedent, but, on the contrary, the same were rendered by these respondents at the request of said executors and in defence of the last will and testament of the decedent, under which they were nominated and appointed.

Further answering, these respondents say that while it is true that the allowance of the compensation to them would reduce the amount of the assets, yet under the law they were entitled to reasonable and fair compensation for their services, and that no other or further sum was allowed them by the court than what they were reasonably and fairly entitled to for their services in the matter.

These respondents, now having fully answered the matters set forth in said petition, pray that they may be hence dismissed with their reasonable costs in this behalf sustained.

JOSEPH SHILLINGTON.
EDWIN FORREST.

Joseph Shillington and Edwin Forrest, being first duly sworn according to law, depose and say that they have read over the above answer by them subscribed and know the contents thereof; that the facts therein stated of their own knowledge are true, and the
75 facts therein stated on information and belief they believe to be true.

JOSEPH SHILLINGTON.
EDWIN FORREST.

Subscribed and sworn to before me this 2 day of January, 1901.
[SEAL.] ALBERT H. SHILLINGTON,
Notary Public.

Endorsement: Answer of Joseph Shillington and Edwin Forrest to petition of John A. Hamilton, receiver, *et al.* Filed May 31, 1901. Louis A. Dent, register of wills.

76 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of ANNIE E. NORTHCUTT. No. 5451, Administration.

This cause coming on to be heard upon the petition of John A. Hamilton, receiver, and others, filed in this cause on the 14th day of

October, 1899, after argument by the counsel for the parties respectively, and upon due consideration thereof by the court, it is this 31st day of May, 1901, adjudged, ordered, and decreed that the prayer of said petition to vacate and set aside the order of January 10th, 1899, making an allowance of three thousand dollars to Edwin Forrest and Joseph Shillington for services as attorneys in the controversy over the will of the said Annie E. Northcutt, be, and the same hereby is, denied.

A. C. BRADLEY, *Justice.*

From the above order the said petitioners, John A. Hamilton, receiver, and others, pray an appeal to the Court of Appeals of the District of Columbia, and the penalty on the appeal bond for costs is fixed at one hundred dollars.

Endorsement: Order overruling prayer of petition of John A. Hamilton, receiver, and others, to vacate order of Jan. 10, 1899. Filed May 31, 1901. Louis A. Dent, register of wills.

77 In the Supreme Court of the District of Columbia.

In re Estate of ANNIE E. NORTHCUTT, Deceased. No. 5451, Adm'n.

Upon application of John A. Hamilton, receiver of James L. Barbour & Son, and H. O. Towles, it is by the court this 17th day of June, 1901, ordered that they be and are hereby granted a severance on appeal from their copetitioners herein.

A. C. BRADLEY, *Justice.*

Endorsement: Order for severance on appeal. Filed June 17, 1901. Louis A. Dent, register of wills.

78 In the Supreme Court of the District of Columbia, Holding an Orphans' Court.

In re the Estate of ANNIE E. NORTHCUTT, Deceased. No. 5451, Adm'n.

Come now John A. Hamilton, receiver of James F. Barbour & Son, and Henry O. Towles, by their attorneys, and appeal to the Court of Appeals of the District of Columbia from the order passed herein on January 10, 1899, allowing counsel fees, and from the order passed herein on May 31st, 1901, overruling the petition of John A. Hamilton *et al.* to vacate said allowance, and request the issuance of citation on appeal to Edwin Forrest and Joseph Shillington, appellees.

CLARENCE A. BRANDENBURG,
Att'y for Appellants.

June 17, '01.

Citation waived.

J. J. DARLINGTON,
Sol. for Appellees, Shillington & Forrest.

Endorsement: Order for appeal and citation. Filed June 17, 1901. Louis A. Dent, register of wills.

Memorandum.

June 17, 1901.—Appeal bond filed.

79 In the Supreme Court of the District of Columbia, Holding an Orphans' Court.

In re the Estate of ANNIE E. NORTHCUTT, Deceased. No. 5451, Adm'n.

Come now the appellants, John A. Hamilton, receiver of James L. Barbour & Son, and Henry O. Towles, and designate the following parts of the record herein to constitute the record on appeal to the Court of Appeals:

1. Petition of Mira Dugan for appointment of collector, filed March 8, 1893.
2. Petition of same for probate of will, filed March 20, 1893.
3. Renunciation of Mira Dugan, filed March 20, 1893.
4. Renunciation of J. H. McCann, filed March 20, 1893.
5. Answer of Mira Dugan to citation, filed August 25, 1893.
6. Issues and order transmitting same to circuit court, filed April 21, 1893.
7. Answer of proponent to caveat, filed April 21, 1893.
8. Motion of Mira Dugan and McCann to strike caveat of Northcutt from files, filed September 7, 1893.
9. Motion to refuse rehearing, filed October 7, 1893.
10. Plea to issues proposed and caveat of Northcutt, filed March 27, 1894.
11. Answer of Mira Dugan and Joseph H. McCann to issues, filed March 29, 1894, but not a copy of issues attached thereto.
12. Order framing and transmitting issues as to the legitimacy of caveator, filed March 29, 1894.
13. Order appointing administrators, filed January 17, 1898.

80 14. Petition for allowance of counsel fees, filed January 10, 1899.

15. Order allowing fee, filed January 10, 1899.
16. Petition of John A. Hamilton *et al.* to vacate order allowing counsel fees, filed October 14, 1899.
17. Answer of Edwin Forrest and Joseph Shillington to petition of Hamilton, filed May 31, 1901.
18. Order overruling petition of Hamilton *et al.*, filed May 31, 1901.
19. Order of June 17, 1901, allowing severance on appeal.
20. Order of June 17, 1901, for an appeal to the Court of Appeals and for citation.

CLARENCE A. BRANDENBURG,
Att'y for Appellants.

Service of copy of above designation acknowledged this 17th day of June, 1901.

J. J. DARLINGTON,
Att'y for Edwin Forrest & Joseph Shillington.

Endorsement: Designation by appellant of record on appeal. Filed June 17, 1901. Louis A. Dent, register of wills.

81 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business,

In re the Estate of ANNIE E. NORTHCUTT, Deceased. No. 5451, Administration Docket No. —.

Stipulation.

It is hereby stipulated by and between counsel that the following additional parts of the record, designated on behalf of the appellees, shall be included in the transcript of record in the above-entitled cause.

C. A. BRANDENBURG,
Attorney for Appellant.
J. J. DARLINGTON,
Attorney for Appellees.

82 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re the Estate of ANNIE E. NORTHCUTT, Deceased. No. 5451, Administration Docket No. —.

Come now the appellees, Joseph Shillington and Edwin Forrest, and designate the following parts of the record herein to constitute the record on appeal to the Court of Appeals of the District of Columbia, in addition to the parts of the record heretofore designated by the appellant:

1. The order of September 5th, 1893, denying and refusing probate of paper-writing of September 21st, 1892.
2. Finding of jury in law case No. 35980, filed herein April 22nd, 1895.
3. The appeal from the order of June 22nd, 1895.
4. Title and conclusion of the brief of twenty pages filed by appellees as attorneys for the executors.
5. Copy of the last will and testament of Annie E. Northcutt, dated, to wit, February 26th, 1892.
6. The order of the circuit court, dated February 20th, 1895, in law No. 35980, naming one George H. Northcutt as plaintiff and the caveatees, Mira Dugan and Joseph H. McCann, named as executors in the certain alleged will of the decedent dated February 26th, 1892, as defendants.
7. The order of June 10th, 1893, in law case No. 34119, naming John H. McGrane as party plaintiff therein and the caveatees, Mira Dugan and Joseph H. McCann, named as executors in the certain alleged will dated February 26th, 1892, defendants.

J. J. DARLINGTON,
Attorney for Appellees.

Endorsement: Stipulation and designations to be included in the transcript. Filed July 10, 1901. Louis A. Dent, register of wills.

83 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

I, Louis A. Dent, register of wills for the District of Columbia and *ex officio* clerk of the said special term for orphans' court business, do hereby certify the foregoing pages, numbered from 4 to 82, inclusive, are true copies of the originals of certain papers on file in the office of the register of wills, *ex officio* clerk of said special term, in case No. 5451, estate of Annie E. Northcutt, deceased, as the same remain upon the files and records of said special term, the same constituting a true and correct transcript of the record, as per direction and stipulation of counsel filed in said cause and made a part hereof.

Seal Supreme Court of the District of Columbia, Probate Jurisdiction.

In testimony whereof I hereunto subscribe my name and affix the seal of the said special term for orphans' court business, at the city of Washington, in said District, this 11th day of July, A. D. 1901.

LOUIS A. DENT.

Endorsed on cover: District of Columbia supreme court. No. 1113. John A. Hamilton, receiver, *et al.*, appellants, *vs.* Joseph Shillington and Edwin Forrest, adm'rs. Court of Appeals, District of Columbia. 'Filed Jul- 13, 1901. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia

No. 1113.

JOHN A. HAMILTON, RECEIVER, ET AL.,
APPELLANTS,

vs.

JOSEPH SHILLINGTON AND EDWIN FORREST.

BRIEF OF APPELLANTS.

BRANDENBURG & BRANDENBURG,
WILLIAM E. EDMONSTON,
Attorneys for Appellants.

GLOBE PRINTING COMPANY.

In the Court of Appeals of the District of Columbia.

No. 1113.

JOHN A. HAMILTON, RECEIVER, ET AL.,
APPELLANTS,
vs.
JOSEPH SHILLINGTON AND EDWIN FORREST.

BRIEF OF APPELLANTS.

STATEMENT OF FACTS.

On March 7, 1893, Annie E. Northcutt departed this life in the city of Washington, leaving a last will and testament bearing date February 26, 1892, whereby she undertook to bequeath to Mira Dugan, a sister, and the three children of said sister, all of her personal estate, and to Joseph H. McCann, all of her real estate, and in and by said will and testament, appointed the said Mira Dugan and Joseph H. McCann, the executors thereof.

On March 8, 1893, the said Mira Dugan filed the will of said Annie E. Northcutt in the office of the Register of Wills, and at the same time filed a petition (Record, page 4), wherein she says she produces and files the will in court, and asks the appointment of the appellees as collectors. Thereafter on March 20, 1893, the said Mira Dugan filed a petition asking for the pro-

bate of the will, but filed at the same time a renunciation of her right to administer and asked the appointment of the appellees as administrators with the will annexed. In the renunciation (Record, page 6), Mira Dugan expressly declares that she is "unwilling to assume said trust for reasons to me (her) appearing sufficient, but, on the contrary, desires to be relieved therefrom," and that she therefore does "*renounce* and *decline* the trust and appointment" and her right to administer and asked the Court to proceed as if she were "not named as an executor in said will." At the same time she filed (Record, page 7) the renunciation of Joseph H. McCann, wherein identical language is used.

Shortly thereafter, one John McGrane filed a caveat to the said will of Annie E. Northcutt, deceased, to which the said Mira Dugan filed answer. No answer was filed on behalf of Joseph H. McCann. Thereupon issues were framed and sent to the Circuit Court for trial, involving, among others, the issue whether the execution of the will was procured by undue influence or fraud of the said Mira Dugan and Joseph H. McCann (Record, pages 8 and 9), to whom the testatrix had left her estate. At the trial of the issues (Record, page 9) the caveator, McGrane, was made plaintiff, and Joseph McCann and Mira Dugan, "*named* as executors in the last will and testament," were named as defendants. At the trial the will was sustained. Later a second caveat was filed by George H. Northcutt, claiming to be a son of the deceased, upon which, on the application of said Joseph H. McCann and Mira Dugan, issues were sent to the Circuit Court for trial, involving the legitimacy of the caveator (Record, page 15). At the trial of the issues before the Circuit Court, the said Mira Dugan and Joseph H. McCann, "who are *named* as executors of said Annie E. Northcutt, de-

ceased," were made defendants. Thereafter, on the coming in of the verdict of the jury sustaining the legitimacy of said George H. Northcutt, it was, on appeal to this Court determined that said George H. Northcutt was concluded by the verdict of the jury in the issues framed on the caveat filed by John McGrane. In all of these proceedings, the appellees or attorneys, appeared on behalf of Joseph H. McCann and Mira Dugan, to whom and to the children of said Mira Dugan, the testatrix had left her entire estate.

Thereafter, on January 17, 1898, the Probate Court admitted the will of February 26, 1892, to probate and granted letters of administration with the will annexed to the appellees, Joseph Shillington and Edwin Forrest, who thereafter duly qualified. At the time of such appointment they had in their possession as collectors, the assets of the testatrix, and which they thereafter held as administrators. The order appointing them (Record, page 19) recites the renunciation of Mira Dugan and Joseph H. McCann as executors.

On January 10, 1899, the appellees filed a petition (Record, page 19), wherein they aver they represented the propounders of the will of the testatrix and as such had rendered services in having the will admitted to probate and record, for which they asked that $3,000 be paid to them, as compensation, out of the estate. On the same day (Record, page 29), and at the same time, and without any notice whatever to creditors of the estate, whose claims aggregate about $8,500, and of whose claims due notice was of record in the office of the Register of Wills, an order was passed reciting the application "for allowance of compensation as attorneys *representing* the *executors under the last will and testament of the decedent*" and authorizing the

payment of $3,000 to the appellees for services "in that behalf."

On October 14, 1899, the appellants and other creditors, whose claims aggregate about $7,000 (Record, page 29), filed a petition wherein they set forth the facts hereinbefore stated, and further, that the personal estate consisted almost wholly of diamonds which could not be sold for more than 50 per cent. or 60 per cent. of the appraised value thereof, and that the payment of the fee allowed by the Court, with the expenses of administration would come wholly out of the fund applicable to the payment of debts, and would greatly reduce the dividend the creditors would otherwise receive; and further, that the real estate of which the testatrix had died seized, had been sold out under the trust existing thereon at the death of the testatrix and failed to realize sufficient to pay the liens thereon. The petition further represented that the petitioners had no notice of the passing of the order allowing counsel fees until a week or ten days before filing the petition, and therefore prayed that the order should be vacated for the following reasons:

"(*a.*) Because said order was obtained *ex parte* and without notice to your petitioners or any of them.

"(*b.*) Because said order was improvidently granted and under a misapprehension as to the facts, the petition of said attorneys and the order based thereon reciting that the services rendered by them and the allowance therefor was as compensation to them as attorneys 'representing the *executors* of the last will and testament of the testator,' whereas, in fact, the services were rendered on behalf of Mira Dugan and Joseph H. McCann, who renounced their appointment as executor and executrix prior to the rendition of said services.

"(*c.*) Because the services rendered by said attorneys were rendered for Mira Dugan and Joseph H. McCann as beneficiaries under said will.

"(*d.*) Because said services were not for the benefit of said estate.

"(*e.*) Because the court was without authority to allow any such expense as a charge against the assets of said deceased, inasmuch as said services were not rendered for or incurred by the executors, there being no executors, and were not incurred 'in the recovery or security of any part of the estate.'

"(*f.*) Because the caveats to said will were filed and all services rendered by said attorneys were rendered before the admission of said will to probate and record.

"(*g.*) Because said services were not rendered for and in behalf or at the request of your petitioners or any of them whereas the allowance was made out of the assets of said decedent to which your petitioners are justly entitled.

"(*h.*) Because if paid out of the assets of the estate, it will reduce the amounts of the payments to be made to your petitioners.

"(*i.*) Because the court was without authority in law to pass an order allowing the payment to said attorneys out of the assets of the testatrix of any sum whatever on account of services rendered by said attorneys on behalf of said Mira Dugan and Joseph H. McCann."

On May 31, 1901, an answer was filed by the appellees (Record, page 34), wherein they represent that the services rendered by them were rendered to Mira Dugan and Joseph H. McCann *as executors*, and that the allowance to them was proper. In answer to paragraph 10 of the petition, the appellees aver:

"They further say that at the time of the procurement of said order for the payment of compensation

to them as attorneys the same was duly published through the ordinary channels and was made a matter of record in the said court, and that at said time the only parties who appeared upon the dockets of said court as attorneys of record were those who appeared in the contest over the will controversy, and that these respondents submitted the matter of their compensation to the court (Mr. Justice Bradley presiding), and the matter of the allowance of said compensation was well known or should have been to petitioners by reasonable diligence, but no action with reference thereto was taken until the filing of the petition herein, more than six months thereafter, and after in the meantime with full knowledge or information on the part of the petitioners or their solicitors that such action had been taken by Mr. Justice Bradley."

Thereafter a hearing was had before Mr. Justice Bradey (Record, page 37), who, on May 31, 1901, passed an order denying the prayers of the petition of the appellants. From that order, and from the order allowing the fee of $3,000, appeal has been presented to this court.

The remaining papers contained in the record are presented for the purpose of informing the court, so far as the record discloses, the capacity in which Mira Dugan and Joseph H. McCann were acting, and for whom the appellees appeared as attorneys.

After the filing of the petition by the appellants, but before answer, the personal estate of the decedent was sold by the appellees. No return of their action has ever been filed by the appellees, but in response to the inquiry of the court below at the argument, it was stated in their behalf that the diamonds realized about $3,000, and added to the proceeds of the balance of the personal estate, amounted to approximately $5,000.

Deducting the $3,000 or 60 per cent. of the entire estate, allowed as a fee, would leave $2,000, out of which would come the heavy expenses of the several useless trials (useless so far as creditors are concerned), and of administration, leaving, at an estimate, about $1,000 for distribution among creditors whose claims aggregate $8,500.

ASSIGNMENT OF ERRORS.

The court below erred.

1. In passing the order of January 10, 1899, allowing a fee to the appellees, because the court was without power to do so, under the circumstances appearing in the record.

2. In passing the order of May 31, 1901, refusing to vacate the order of January 10, 1899.

3. In allowing any fee whatever to the appellees, payable out of the fund in the hands of the administrators.

4. In allowing a fee to the appellees payable out of the estate, without notice to the appellants and other creditors.

BRIEF.

It is believed there cannot be found in the books a case parallel to the case at bar, wherein beneficiaries named in the will, repudiate the duty and trust of administration committed to them by the will, and thereafter employ counsel and litigate their title to share in the probable surplus of the estate, at an expense, including counsel fees and court costs, approximating eighty per cent. of an estate of $5,000, the estate being insolvent. Succintly stated, the case at bar presents for determination the question of the right and propriety of the court below, allowing out of the insolvent estate of Annie E. Northcutt, approximately $4,000,

as the expense of litigation that was not intended to benefit, and could not possibly have benefited the estate, and was not conducted for the purpose of securing or preserving any part thereof.

At the outset, it will be observed, the petition expressly avers that the petitioners had no notice of the application of the appellees for the allowance of counsel fees, nor of the order allowing the same, until within a week or ten days prior to the filing of the petition to vacate the order of allowance. To this, the appellees, in paragraph ten of their answer (Record, page 36), under oath, say "that *at* the time of the procurement of said order for the payment of compensation to them as attorneys *the same* was duly published through the ordinary channels and was made a matter of record in said court and that at said time the only parties who appeared upon the docket of said court *as attorneys* of record, were those who appeared in the contest over the will * * * and the matter of the allowance of said compensation was well known or should have been to petitioners by reasonable diligence, but no action was taken until the filing of the petition more than six months thereafter, and after in the meantime with *full knowledge or information* on the part of the *petitioners or* their *solicitors* that such action had been taken."

To say the very least, the answer is evasive. Exactly what the first part of the answer quoted means, is difficult to say. It cannot mean that any publication was made of the *intention* to apply for the order, for that is obviously untrue. It is silent as to what the "ordinary channels" of publication are. It was admitted at bar, however, that it meant in the Court Journal and the daily newspapers, in the record of court proceedings that *had* taken place. Assuming that to be so, it was of

course no notice, and in the absence of an averment of notice of such publication, upon positive knowledge, we assume the express averment of the petition will be taken to be true.

It is also evasive in averring that the only *attorneys* of record, were the attorneys of the parties to the litigation, without denying the averment of the petition that at the time the claims of the appellants had been probated and duly recorded in the office of the Register of Wills.

THE APPLICATION WAS NOT FILED TOO LATE.

There is surely no force in the suggestion that the petition was filed too late, because it was filed six months after the order was signed. It was filed within ten days or two weeks after discovery that the order had been signed.

In this connection, it will be noticed the appellees as administrators have never filed or settled their accounts. The administration has never been closed. In this state of affairs, it is not too late to secure an order vacating the allowance of a claim, at any time before accounts are settled, and if the persons securing the allowance are also administrators of the estate, it is not too late at any time before the settlement of the *final* account, even though years have elapsed since the allowance, and even actual payment of the claims in their favor.

In Scott vs. Fox, 14 Md. 388, the court said that the approval of the administrator's account is only prima facie. Their ex parte character imperiously requires that they should be so. Errors in them have been repeatedly corrected when made to appear, even as long as seven years after.

The case of Bantz vs. Bantz, 52 Md. 686 is an important one. The court said:

> "As long as the estate is open, that is, not finally closed and settled, the accounts of the executor in the Orphans' Court are subject to revision and correction in respect of any matter discovered to be erroneous. * * * The simple passage of a claim by the Orphan Court or the passage and approval of an account pertaining to it does not establish the correctness of either.
>
> "*Parties interested in the distribution of a deceased's estate may, in a proper way and within a reasonable time, object to the propriety of a claim preferred by the executor of the deceased for services rendered her, although it has been passed upon and allowed ex parte by the Orphans' Court and included by the executor in his account.*"

In that case four years had elapsed between the allowance to the executor and the application for its correction and three accounts had been approved and passed in the meantime.

To the same effect is Wilson vs. McCarty, 55 Md. 280.

Substantially the same objection was made in this court in Tuohy vs. Hanlon, Wash. Law Reporter, June 20, 1901, decided May 21, 1901, in which this court said:

> "And inasmuch as they (cost) are elements of the accounting and concern the administration of the estate, their allowance or disallowance is not limited by the terms prescribed for an entirely different purpose, but is within the control of the court during the whole period of administration."

THE ORPHAN'S COURT HAD NO AUTHORITY TO ALLOW COUNSEL FEES TO THE APPELLEES.

The documents and extracts from the record contained in the record before this court, other than those referred to in the "Statement of Facts," are presented for the purpose of showing exactly in what manner and in whose names the litigation was conducted, on account of which the fee was allowed the appellees.

It will be observed that the petition accompanying the will (Record, page 4) was not joined in by Joseph H. McCann, one of the executors, nor does it purport to have been filed on behalf of the persons named as executors, nor does it request the probate of the will. Neither does the petition filed on March 20, 1893, purport to have been filed on behalf of the executors. Joseph H. McCann is not a party thereto. While that petition requests the probate of the will, it is obvious it was not intended or to be taken as an acceptance of the trust, because it was accompanied by a renunciation of the petitioner and of Joseph H. McCann, and requested that letters issue to the appellees. The language of the renunciation is significant. Each says he or she is "unwilling to assume said trust * * and therefore * * renounce and decline the trust * * and ask the court to proceed as if I was not named as an executor in said will."

Were then the services rendered by the appellees rendered "the executors under the last will and testament?"

The appellees, to support their claim that the services were rendered on behalf of the executors, after their renunciation, rely upon the order of June 10, 1893, made in the Circuit Court, wherein Joseph H. McCann and Mira Dugan, "*named* as executors in the last will and testament," were made defendants; the order

of February 20, 1895, also made in the Circuit Court, whereby Mira Dugan and Joseph H. McCann, "*who are named* in the will as executors," were made defendants; and the conclusion of a brief filed by the appellees wherein they sign themselves as "Attorneys for Executors," though the title of the very same brief (Record, page 14) is "Brief on Behalf of Mira Dugan and Joseph H. McCann," without any suggestion that it was in their behalf *as* executors. The language of the orders in the Circuit Court making them defendants obviously is descriptive of the persons merely.

On the other hand, the answer of Mira Dugan (there never was any on behalf of Joseph H. McCann) to the caveat of John McGrane (Record, page 7) is in her own right as beneficiary and was signed by one Campbell as "attorney in fact." The issues (Record, page 8) do not refer to Mira Dugan as executrix, and make no mention whatever of Joseph H. McCann on whose behalf the services of the appellees were also rendered. The answer to the rule to show cause issued (Record, page 9) was filed by Mira Dugan in her own right, no mention being made of McCann, nor does it contain any suggestion that it was filed on behalf of the executors. It is signed by the appellees as "Proctors." The answer to the caveat of George H. Northcutt was filed on behalf of Mira Dugan and Joseph H. McCann, in their own right and not as executors. The order of court passed on September 5, 1893 (Record, page 13), refers to the proceedings on the law side wherein "Mira Dugan and Joseph H. McCann were caveatees and defendants," without suggesting that they were acting as executors. The motion filed by the appellees (Record, page 13) was on behalf of "Mira Dugan and Joseph H. McCann, by *their* proctors," and not as executors, and was signed by the appellees as "Proc-

tors for Mira Dugan and Joseph H. McCann," but not as executors. The plea to issues proposed on caveat of George H. Northcutt (Record, page 14) was on behalf of "Mira Dugan and Joseph H. McCann, by their proctors" and not as executors, and was signed in the same manner. The order framing issues purports to have been made on behalf of the same persons, in their own right and not as executors (Record, page 15).

The answer to the issues (Record, page 16) is in behalf of the same persons in their own right and is signed by the appellees as "Proctors for said Mira Dugan and Joseph H. McCann." The appeal to the Court of Appeals was on behalf of "Mira Dugan and Joseph H. McCann," but not as executors (Record, page 19). The order granting probate was passed on consideration of the petition of "Mira Dugan," and expressly recites the renunciation of the persons named as executors.

Under these circumstances, what justification, other than a desire to saddle the expense of useless litigation on the estate, can exist for claiming that the services were rendered on behalf of Mira Dugan and Joseph H. McCann *as* executors?

It will be observed the caveat expressly charged Mira Dugan and Joseph H. McCann with fraud in the execution of the will. In addition to the desire and necessity of resisting this serious charge, they were named as the principal beneficiaries. Shall their action now be referred to a performance of their duty as executors and a single desire to secure its probate? Is it possible that the court will consider that by *implication*, the persons named as executors, withdrew their caveat or changed their mind, in the face of an *express* written renunciation, and of the fact that they never sought letters thereafter? In the face of the ex-

press written renunciations had the creditors any reason for believing that all this litigation between persons named as beneficiaries, charged with fraud in the execution of the will, was being had at their expense? It will be observed that there was no litigation in efforts to secure or recover any part of the estate. The estate was in the hands of the collectors, merely awaiting distribution in due course of administration.

It was generally believed, until the decision of this court in Tuohy vs. Hanlon (Wash. Law Rep., June 20, 1901), that no allowance could properly be made out of the estate to a person named as executor, for costs and counsel fees incurred in litigation over the validity of a will, before its probate, in the event the will was vacated. This court held in that case, however, that such an allowance was proper without regard to the success or failure of the litigation where the person named as executor "had accepted the trust by filing a petition for *letters testamentary* and *entered upon the discharge of the trust.*" That case would seem to effectually dispose of the case at bar. That the acceptance of the trust, and not the mere fact of being named as executor, is the controlling feature in determining whether expenses incurred in a contest over the validity of a will before probate, is the controlling feature, is manifest from the emphasis laid upon it in the opinion of this court in the Tuohy case. This court then said:

> "In the present case it appears that he (the person named as executor) had actually reduced the personal estate into his own possession. * * * He seems, therefore, to have already entered upon the performance of the duties of an executor."

Again:

> "Of course, a person named in a will as executor is under no obligations to accept the trust reposed in him by the testator. *He may renounce the executorship, and thereby relieve himself from all duty and from all liability connected with it.* But, as in the case of every other trust, if he accepts it, he must proceed with the execution of it, and he cannot be relieved from so doing, except by the order or decree of a court of competent jurisdiction. The executor named in the present case accepted in good faith the trust confided to him by his testator, when he filed his petition for the probate of the will and the *issue to him of letters testamentary.*"

In that case the executor filed a petition for the probate of the will and requested that letters testamentary *be issued to him.* In addition to that, the person named as executor derives his interest from the will itself and he can do most of the things before the probate of the will that he can do after, and in the Tuohy case, the person named actually took possession of and administered the estate *pro tanto.* In this case, the original petition did not ask the probate of the will. The second petition, filed by one of the persons named as executors only, while asking the probate of the will, at the same time requested that letters issue *to the appellees* and was at the time *accompanied by a formal renunciation* and declination of the trust. Moreover, in the case at bar, the persons named as executors never took possession of the estate as executors and never attempted in any manner to administer the estate, and whenever they made themselves heard in court, it was always that some one else might be appointed to administer the estate. If Mira Dugan and Joseph H. Mc-

Cann had requested the probate of the will and the issue of letters to themselves, instead of renouncing, it may well be that they could not have withdrawn, and could not be considered as having withdrawn, without leave of court, but in the light of the formal renunciation filed by them, the court could not have required them to accept the trust. And, whether a renunciation may be withdrawn, which we deny, is immaterial, we submit in this case, because it was never withdrawn.

A recent and authoritative decision upon the right to withdraw a renunciation appears in the case of Lutz et al vs. Mahn, 80 Md. 233. In this case letters of administration were granted to intestate's son upon his ex parte application and statement that there was no other son, while as a matter of fact there was an elder son who was entitled to administer. In order to remedy the infirmity the elder son renounced his rights to administer, but subsequently endeavored to withdraw it. The court in speaking of the effect of the renunciation, said:

> "John Lutz (elder son), *by his action excluded himself from all further interest in the administration.* His wishes could not confirm an appointment already made, nor control the making of one in the future. * * *
>
> "John Lutz filed a petition praying that he might be permitted to withdraw his renunciation. The Orphans' Court dismissed his petition. He does not allege that it was made through mistake, as was the case in Thomas vs. Knighton, 23 Md. 318; nor does he allege any other sufficient reason. We think that the question is settled by Stockdale vs. Conaway, 14 Md. 99. We will affirm all the orders in the case."

In the case of Stockdale vs. Conaway, referred to above, testator's eldest male child filed in the Orphans' Court a renunciation of his right to administration d. b. n., signed but not sealed by him, in which among other things it appears that he renounced all his right and claim to administer, at the same time requesting that letters of administration de bonis non be granted to John H. Conaway. Subsequently application was made by a sister to revoke the letters granted Conaway pursuant to said renunciation, and said eldest son insisted that if such application should be granted, he was entitled to administer in preference to his sister, that his renunciation was with the express understanding and agreement that letters should be granted to John H. Conaway, and if they be revoked, he asked leave to withdrew his renunciation and that letters be granted to him. The court in holding that his renunciation was final and could not be retracted or abandoned, said:

> "The law gave to him the right to administration but did not make it incumbent upon him to exercise it. There is no reason why his election should not be as binding on him, in a case like the present, as it would be in any other; and there can be no doubt that a party may conclude himself by his admissions and acts; 'an election being once made, so as to charge the defendant, cannot, at a subsequent period, be prospectively retracted or abandoned.' Evans et al vs. Iglehart, 6 G. and J. 171."

A similar position to the foregoing was taken in the case of Carpenter vs. Jones, 44 Md. 625.

Again, in the case of Glenn vs. Reid, 74 Md., 238, the court said:

> "It is clear, we think, that the wife and children of John O'Reid, deceased, had by a declara-

> tion in writing renounced all their right, title and claim to administration, and the Orphans' Court had full power to proceed as if they were not entitled. And that this declaration could not afterwards be withdrawn, is established by the cases of Carpenter vs. Jones. 44 Md. 626; Pollard, Admr. vs. Mohler, 55 Md. 289."

In the case of Thornton vs. Winston, 4 Leigh 152, an executrix declined to qualify as such and agreed that administration with the will annexed should be granted to her daughter reserving the right to qualify after her daughter's death. The court in a very carefully considered opinion held that this renunciation of the executrix was absolute and perpetual and could not be retracted after the death of such administratrix.

Some contention was made below that the action of the court is essential to make a renunciation effective. We respectfully deny the proposition, because, if true, the court would possess the power to refuse to accept the renunciation, and could compel the person named to act who had not in any way accepted the trust, but had expressly declined it. A man may not be made a trustee without his consent, which that argument presupposes, if acceptance by the court is essential.

It is a well established rule of law that any writing showing the intention of an executor to renounce will be sufficient for the purpose, provided it *appears upon the record or is filed in the proper office.*

> Houston vs. Mateer, et al., 16 Serg. & R. 416, 418.
> Sawyer vs. Dozier, 5 Ired. L., 97, 101.
> Bowman's Appeal, 62 Pa. St., 166, 169.
> Solomon vs. Wixon, 27 Conn., 520, 526.
> Smith's Appeal, 61 Conn., 420, 428.

As taking the same position, see Ayres vs. Weed, 16 Conn., 291, 296, where the court says:

> "On the other hand, the authorities, although not numerous, are most explicit to show that an express renunciation is not requisite, but that the refusal to act as executor may be implied; and several cases of the latter description are given by Comyn in his digest, tit. Administration, B. 4, where he says: 'If the executor send a letter, etc., to the Ordinary, by which he renounces, and the refusal be recorded, it is sufficient. Off. Ex., 54, R. Cro. Eliz. 92, Leo. 135.' * * In Broker vs. Charter, Cro. Eliz. 92, it was decided that an executor may refuse to act by parole, and that if he once so refuses, he cannot afterwards administer."

Moreover, even were it true that acceptance of a renunciation is necessary to make a renunciation effective, certainly action taken by the persons named as executors in employing counsel and conducting expensive litigation *without order of court*, who are at the same time beneficiaries, and who are by the litigation assailed for alleged fraudulent conduct, is not to be referred to the exercise of the trust or duty of executors, in the presence of a formal written renunciation. Such persons may litigate at their own expense, but surely not wholly at the expense of creditors.

We therefore earnestly submit that the Justice of the Probate Court was without power in law to make the order allowing the appellees counsel fees, and that the order appealed from should be reversed.

BRANDENBURG & BRANDENBURG,
WILLIAM E. EDMONSTON,
Attorneys for Appellants.

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1901.

JOHN A. HAMILTON,
Receiver, et al.,
vs.
JOSEPH SHILLINGTON, et al.

No. 1113.

BRIEF FOR APPELLEES

J. J. DARLINGTON,
For Appellees

MILANS, LAW PRINTER, WASHINGTON, D. C.

In the Court of Appeals of the District of Columbia.

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STATEMENT.

One Annie E. Northcutt, by will dated February 26th, 1892, left her personal property to her sister, Mira Dugan, her neices, Irene Dugan and Detta Dugan, and her nephews, Phillip Dugan and Frank Dugan; devising her real estate to Joseph H. McCann. Mira Dugan and Joseph H. McCann were named as executors.

On March 8th, 1893, Mira Dugan, one of the executors presented the will to the Orphans' Court, and asked the appointment of collectors pending the proceedings for probate, one of the next kin residing in Ireland, and the circumstances being such that some proper person should be placed in possession of the property pending the delay thus made necessary. On March 20th, Mrs. Dugan filed in the Orphans' Court a paper renouncing the position of executor, and requesting the appointment of the present appellees as administrators. Mr. McCann, also, on the same day, filed similar renunciation.

Thereafter, a caveat having been filed by certain parties in interest, alleging that the testatrix was of unsound mind, and that the will had been obtained by undue influence and threats, Mrs. Dugan, in her capacity as propounder of the will (Record, p. 7), answered, denying the mental incapacity and fraud alleged, and praying that the will might be admitted to probate and record, and that letters c. t. a. thereupon might be issued to the persons named in the former petition. Issues were made up, and, the cause coming on for trial, the Court passed the order set forth at page 9 of the Record, making John McGrane, the caveator, plaintiff, and "Joseph McCann and Mira Dugan named as executors in the last will and testament of the deceased," defendants. Subsequently, an alleged later will, dated September 21st, 1892, being offered for probate by McGrane, Mrs. Dugan filed the answer set forth at pages 9 to 11 of the Record, setting up the will of February 26th, 1882, wherein she and McCann were made executors, referring to the petition filed by her praying that the will might be admitted to probate and record, the making up of issues for trial, and claiming that the fact that the said will of Februrary 26th, 1892, was the last will was conclusively determined upon the trial of those issues, and again praying the court to admit that will to probate as the last will and testament of the decedent. At pages 11 and 12 of the Record, Mrs. Dugan and Mr. McCann moved to strike out another caveat filed by one George H. Northcutt to the will of February 26th, again praying for an order authorizing the probate and record of that instrument, which application was granted by the court. Various other proceedings took place, in which Mrs. Dugan and Mr. McCann were represented by the appellees, sometimes signing themselves "Proctors for Mira

Dugan and Joseph H. McCann," and sometimes "Attorneys for executors," etc. The cause was twice tried before before a jury in the Circuit Court, and three times in this Court, besides numerous proceedings in the Orphan's Court, and resulted in the establishment of the will of February 26th, after which the appellees, by their petition set forth at pages 19 and 20 of the Record, applied to the court for an order allowing compensation for their services. The amount of the services are to some extent shown by the docket entries copied into the record, (pp. 21 to 29,) and their value by the affidavits of Messrs. William J. Miller and A. B. Duvall (Record, pp. 20 and 21.)

On January 10th, 1899, the court passed an order allowing the appellees a fee of $3,000, as their compensation "as attorneys representing the executors under the last will and testament of the decedent." (Record, p. 29.) On the 14th of October following, the present appellants, creditors, filed a petition in the Orphans' Court alleging insufficiency of the assets to pay the claims of creditors in full, objecting that they had not had notice of the application to allow counsel fees, and claiming that, in the litigation, the appellees were the attorneys of Mira Dugan and Joseph H. McCann as beneficiaries, and not their attorneys as executors; that their services were not rendered for nor incurred by the executors, "there being no executors," etc. The answer of the appellees, set forth at pages 34 to 37, of the record, stated that the renunciation of the two executors, though filed, had never been acted upon by the court until the appointment of the administrators with the will annexed after the litigation had terminated, and that they appeared in the cause as attorneys for the parties named as executrix and executor respectively in defending said will, denying that the compensation made

to them was not made to them as attorneys representing the executor and executrix, or that their services were rendered to Mrs. Dugan and Mr. McCann as beneficiaries, and averring on the contrary that their services were rendered to the executrix and executor, in defense of the will and for the benefit of the estate, and at the request of the executors.

The court, by its order of March 31st, 1901 (Record, pp. 37 and 38), after argument by counsel for the respective parties, and upon due consideration, denied the application to vacate the order making the allowance, and the cause is here upon appeal from this order.

Points and Authorities.

The ground principally urged in support of the appeal is, that both Mrs. Dugan and Mr. McCann filed their written renunciations as executors under the will, and that this act of renunciation is irrevocable, so that they could not afterwards withdraw the same or act as executors. In support of this proposition, quite a number of Maryland authorities are cited, all to the effect that a person entitled under the Statute of Distributions *to be administrator*, who files a renunciation of his right, cannot afterwards withdraw the same and insist upon being made administrator. All these authorities, upon examination, will be found to turn upon the language of the statute: "If any person entitled to administration shall deliver, or transmit to the Orphans' Court a declaration, in writing, that he is willing to decline the trust, the court shall proceed as if such person were not entitled." And the decisions in question are simply to the effect that, in the case contemplated by the statute, it is not error for the court to refuse to allow the renunciation to be withdrawn, and that the party who has renounced cannot complain,

or successfully appeal, if the court declines to allow such withdrawal and proceeds to appoint another administrator.

That the court *may* allow withdrawal, however, in a proper case, is shown by the case of Thomas *vs.* Knighton, 23 Md., 318; and, if it were necessary for present purposes, it might be well contended that the court had, in effect, allowed this in the present case, by the numerous proceedings subsequently pursued in the case in which the executors are recognized as such by the court.

The whole point of the objection, however, disappears, when the provision of the statute for the case of renunciation *by executors* is looked at, that provision (Dennis Probate Law, p. 36) being as follows:

> "If any executor or executrix named in a will shall file or transmit to the orphans' court an attested renunciation in writing of his or her trust, there may be the same proceedings with respect to granting letters testamentary or of administration as if the party so renouncing had not been named in the will; provided, nevertheless, that any executor or executrix named in a will shall be entitled, notwithstanding any failure or renunciation as aforesaid, on filing a bond as aforesaid before letters testamentary or of administration shall actually be committed to another or others as aforesaid, to have letters testamentary granted to him or her, or to be included therein, as the case may require.'

We have then, in the present case, the propounding of the will by one executor for probate; later, a petition by her that letters of administration, with the will annexed, might issue to Messrs. Shillington and Forrest, accompanied by the filing of a written renunciation by herself and by her co-executor McCann, followed by a caveat setting up fraud, undue influence and mental incapacity, after which the two executors and the court permit the renun-

ciations to lie dormant and unacted upon, the executors defending the will against both the caveat then filed and the one subsequently presented, and succeeding in establishing the will. It is submitted that the case falls fairly within the principle and reasoning of Tuohy *vs.* Hanlon, 29 Washington Law Reporter, 417.

The circumstances that the executors are also named as beneficiaries in the will is sought to be availed of as giving color to the proposition that the services rendered by the attorneys were rendered to the executors in their individual capacity and not as executors; and the language of the court in sundry of the orders passed, in which Mrs. Dugan and Mr. McCann are referred to as executors under the last will and testament, is sought to be evaded by the suggestion that these references are merely in the nature of a *descriptio personae*—appararently in analogy to the rule of commercial paper and the like that, where one signs a promise or undertaking, and adds the word "trustee," "agent," or the like, the latter are at least, *prima facie*, merely *descriptio personae*. Why *the court* should find it necessary to identify the parties to the suit before it by description of their persons, is not suggested; nor, it is conceived, can the reason of the rule in the case of mercantile paper, bonds and the like be found in any respect applicable. It is, moreover, to be noted that Mr. McCann was wholly without interest in the proceedings in question, they having taken place before the Wills Act of 1898, and when the probate or rejection from probate of the will would not have constituted even *prima facie* evidence for or against him in relation to the only property, namely, the real estate, which the will purports to dispose of in his favor.

The question is, at most, one of fact. The court below, in which nearly all the proceedings transpired, has twice

decided this question in favor of the appellees, once when the order was passed originally, and secondly upon the application to vacate it. It is respectfully submitted that there is nothing in the record upon which error in the conclusion upon this point reached by the court can be predicated—namely, its decision that, in these proceedings before it, the appellees acted as counsel for the executors. And, if this court is not required by the proofs before it to reverse this decision of the court below, it follows from Tuohy *vs.* Hanlon that the allowance is merely, and properly, a question of costs, which is not appealable.

If appealable, the Record shows that the compensation allowed was a moderate and reasonable one, nor was anything offered in opposition except the fact that the estate proved insolvent, and that the payment of the necessary and reasonable compensation of counsel largely reduced the dividend which creditors might receive. Until these questions as to the validity of the will were determined, there could be no administration at all, and nothing could have been realized by or paid to the creditors.

It can scarcely be asserted that the claims of creditors are paramount to those of the reasonable and unavoidable expenses of the administration of the estate.

Respectfully submitted.

J. J. DARLINGTON,
For Appellees.